Supreme Court, U.S.
FILED
04 368 SEP 14 2004
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No.

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Arthur Andersen LLP's conviction for witness tampering under 18 U.S.C. § 1512(b) must be reversed because the jury instructions upheld by the Fifth Circuit misinterpreted the elements of the offense, in conflict with decisions of this Court and the Courts of Appeals for the First, Third, and D.C. Circuits.

RULE 29.6 STATEMENT

Petitioner Arthur Andersen LLP is a limited liability partnership. It has no parent corporation and no publicly held company owns stock in the partnership.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit (Pet. App. 1a-34a) is reported at 374 F.3d 281.

JURISDICTION

The Fifth Circuit affirmed the conviction on June 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 63a-77a) reproduces the text of 18 U.S.C. §§ 1503, 1505, 1512, and 1515.

STATEMENT OF THE CASE

This case arises out of the conviction of Arthur Andersen LLP ("Andersen") for encouraging its employees to comply with the firm's standard document retention policy during the four-week period that preceded the SEC's initiation of a formal proceeding concerning Enron Corporation in 2001. That policy required Andersen employees to prepare and retain final work papers sufficient to fully and accurately document their audit conclusions, and then to discard unnecessary drafts and notes. Andersen employees who compiled the Enron work papers did not seek to excise damaging facts or to conceal knowledge of a crime, and they genuinely believed that compliance with the policy prior to initiation of an SEC proceeding and receipt of a subpoena was lawful and proper.

For more than a century, it had been settled law that destruction of documents prior to the initiation of judicial or agency proceedings is not obstruction of justice. The Government accordingly sought to circumvent the limits on the crime of obstruction by indicting Andersen for "witness tampering" under 18 U.S.C. § 1512, which prohibits attempts to "kill," "threaten," or "corruptly persuade" potential witnesses. In the Government's view, it was perfectly lawful for Andersen's employees to comply with the document retention policy themselves, whatever their motive might be, prior to the start of a proceeding. But it

was criminal "corrupt[] persua[sion]" to remind *others* about the policy if the reminder was even partially motivated by an intent to "impede the fact-finding" of some possible future investigation. The Fifth Circuit agreed. That expansive interpretation of the statutory language cannot be reconciled with this Court's precedents, has been squarely rejected by three circuits, and criminalizes conduct undertaken without any consciousness of wrongdoing. Arthur Andersen did not commit a crime.

Proceedings In The District Court

1. Andersen was indicted on March 7, 2002, in the Southern District of Texas. R. 8.[1] The indictment charged a single count of obstruction of justice, alleging that between October 10, 2001, and November 9, 2001, Andersen "corruptly persuade[d]" its employees to destroy documents with the intent to impair their availability in an "official proceeding[]," in violation of 18 U.S.C. § 1512(b)(2) (2000). R. 1-2. The trial began on May 6, 2002, and the case was submitted to the jury on June 6, 2002.

The jury regarded the case against Andersen as close and difficult. It deliberated for seven full days, repeatedly sought guidance from the court, and then declared itself deadlocked. Tr. 6695, 6711, 6719-20, 6723, 6743, 6795. The court delivered an *Allen* charge and the jury resumed deliberations. Three days later, the jury returned a guilty verdict. Pet. App. 2a.[2]

2. The jury was charged on June 5, 2002. Tr. 6326-49. Andersen objected to the court's instructions concerning two key elements of the offense.[3] First, the court instructed

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[1] Citations to "R." refer to the record filed in the Fifth Circuit. Citations to "Tr." refer to the trial transcript in the district court.

[2] Andersen has ongoing business operations and continues to suffer adverse consequences from the conviction. It is also actively defending more than a hundred civil actions against the firm and former partners for billions of dollars in alleged damages arising out of its representation of Enron. The conviction prejudices Andersen's defense of these and other civil actions and has been used by insurers to contest coverage.

[3] The statute authorized ten years imprisonment if the defendant

the jury that the term "corruptly persuades" means persuasion partially motivated by an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" even if "Andersen honestly and sincerely believed that its conduct was lawful." Pet. App. 48a, 49a. Andersen repeatedly objected to the court's determination that "corrupt" persuasion could be equated with an "improper purpose," and argued that the term requires proof of improper means of persuasion or inducement to unlawful acts, or at least conscious wrongdoing. *See* R. 431, 440, 912, 917; Tr. 4317.

Second, the district court instructed the jury that the term "official proceeding" included the SEC's performance of any "investigative functions[]" whether "formal [or] informal." Pet. App. 47a. Andersen objected because neither the statutory definition nor the SEC's own regulations can be read to include informal investigations conducted by the staff, which has no power to subpoena documents or compel testimony. R. 426-29.[4] In addition, Andersen proposed instructions designed to ensure that the jury would be required to find a close nexus between an employee's reminder to follow the document retention policy and any future SEC proceeding. R. 148, 424-26, 938-39; Tr. 4339-45. The district court instead instructed the jury that

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"knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(2)(B) (2000). The official proceeding "need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(e)(1) (2000).

[4] *See* 18 U.S.C. § 1512(b) (prohibiting, *inter alia*, interference with "testimony" and "summons[es]" in an "official proceeding," which is defined in § 1515(a)(1)(C) as a "proceeding *before* a Federal Government agency" (emphasis added)); 17 C.F.R. § 201.101(a)(1), (4), (7), (9) (defining an SEC "proceeding" only to mean an "agency process initiated ... [b]y an order instituting proceedings," which requires a vote of the Commissioners).

the Government did not have to prove that the "corrupt persuader" had any particular proceeding in mind or knew that a future subpoena was likely.[5]

Evidence at Trial

The Fifth Circuit's opinion summarizes portions of the record that the jury might have relied upon to conclude that an Andersen employee persuaded a co-worker to follow the document retention policy, at least in part, for the purpose of "imped[ing] the fact-finding" of a future SEC proceeding.[6] Andersen's appeal, however, did not dispute that the evidence was sufficient to support this conclusion. Andersen instead contended that its conviction must be reversed under any correct interpretation of the statute because no error in the instructions at issue here could be harmless. The record evidence would require, or at the very least permit, the conclusion that no Andersen employee used improper methods of persuading coworkers, solicited conduct that was itself unlawful, had knowledge that a crime had been committed, engaged in conscious wrongdoing, or even believed that an SEC subpoena was probable at the time of the relevant conduct. Because the Fifth Circuit had no need to thoroughly evaluate such evidence due to its far-reaching interpretation of the statute, the following supplements the Court's statement of facts in order to illuminate the importance of these instructional issues.

1. Andersen was responsible for auditing Enron's publicly filed financial statements. The firm's "engagement team" for the Enron account in 2001 was led by David Duncan. During the summer and fall of 2001, Andersen

[5] The jury was told: "The Government *need only prove* that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." Tr. 6345 (emphasis added).

[6] The district court properly instructed the jury that Andersen could only be found liable if one of its employees violated § 1512(b) and the Fifth Circuit's opinion focuses only on the conduct and intent of David Duncan and Nancy Temple (who was never indicted). Pet. App. 47a, 4a-7a.

learned of potential problems with Enron's financial statements and formed a team to evaluate and resolve those issues. Pet. App. 4a. This team included some of the firm's most respected auditors, as well as Nancy Temple, an in-house lawyer in Chicago and former partner at Sidley & Austin. At the time, the team was principally concerned with the discovery that Andersen had permitted Enron to use an improper accounting methodology to measure potential impairment of notes received from entities known as the Raptors. Pet. App. 3a-4a. The error concerning the Raptors' accounting could have potentially required a restatement of Enron's income statements, but that question could not be resolved without first evaluating the results of alternative methodologies. Tr. 1794.

On October 9, 2001, Nancy Temple prepared notes stating that "some SEC investigation" was "highly probable" but that there was merely a "reasonable possibility" of a "restatement." Pet. App. 5a; GX NT-1009.[7] Andersen employees explained that they considered some SEC inquiry concerning Enron to be likely, but that they did not believe that the SEC would institute a formal proceeding and issue a subpoena for Andersen's documents unless Enron's income for prior years had to be restated. Tr. 1445-49, 1904-05, 5896, 6087. An SEC official confirmed at trial that this expectation was correct; the agency was not planning to request documents from Andersen unless Enron restated its income. Tr. 783-84.

On October 12, Temple entered the Enron matter into Andersen's internal tracking system and under the category of "Type of Potential Claim" she selected the designation "Professional Practice—Government/Regulatory Investigation" from a list of several options. The entry included a notation, however, that the firm was still uncertain whether a restatement would be necessary. GX 928B.2. Temple sent an email to the Practice Director for Andersen's Houston

[7] Citations to "GX" refer to the government's exhibits in the district court. "DX" refers to Arthur Andersen's exhibits in the district court.

office that day, stating that "[i]t might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy."[8] GX 1012A. The Practice Director forwarded her email to David Duncan.

On October 16, 2001, Enron released its third quarter results which disclosed a $1.2 billion restatement of its balance sheet. Pet. App. 5a. In Andersen's experience, a balance sheet restatement (in contrast to an income restatement) would not lead to a formal SEC investigation. Tr. 6195-98. Consistent with Andersen's expectation, the SEC sent a letter to Enron advising that it had opened an *informal* investigation; the letter did not seek documents from Andersen. GX 1017B. Andersen learned of the letter on October 19. Pet. App. 6a. The Enron consultation group had a conference call the following Saturday morning. A witness testified that Temple reminded participants "to make sure to follow the policy." *Id.*[9]

2. On October 23, Duncan scheduled a meeting in Houston where he "directed the engagement team to comply with Andersen's records retention policy." Pet. App. 6a. Copies of the document retention policy were distributed at the meeting. Andersen's policy required its personnel to *retain* all information of importance to an audit in order to ensure that the firm's work papers would fully and completely document Andersen's work. GX 160A at ¶¶ 2.0, 3.1, 3.4.1, 3.6, 3.6.1. Once the pertinent information was fully documented, the policy required "related

[8] Temple had been advising the engagement team that completed memos relating to the Raptors' impairment issue should be preserved in their original form under the terms of the policy and corrections should be documented in supplemental memoranda. Tr. 2440-41; GX NT1009.

[9] The witness explained that "[i]n my mind" this suggestion was "a follow-on from the conversations that we had had earlier about the need to ... get accurate documentation into the record." Tr. 1471. She also testified that the participants only anticipated a "Comment Letter" from the SEC, and that those letters *never* request access to an accounting firm's documents. Tr. 1447-49.

information," such as duplicates, drafts, and notes, to be shredded to protect the confidentiality of client financial information. *Id.* at ¶ 3.5.3. The policy further stated that this "related information should not be destroyed" after the firm was "advised of litigation or subpoenas regarding a particular engagement." *Id.* at ¶ 4.5.4.

Although David Duncan pled guilty to witness tampering and was required to cooperate with the Government at Andersen's trial, his testimony demonstrated that, at a minimum, the jury could have found that neither he nor anyone else involved in the efforts to comply with the document retention policy sought to ferret out harmful information or engage in conscious wrongdoing. Duncan acknowledged that he thought there was some "potential" that the "SEC might want some of our documents" (Tr. 2478-80) and that this "potential" was "on my mind at the time I instructed people to do this." Tr. 1907-08.[10] But he also told the jury that he believed that compliance with the policy "was all entirely appropriate until when I received a subpoena." Tr. 1909. He explained that he requested the team to "come into compliance with the policy," not to "do any more or any less," and to "refer to the policy to make sure they understood it." Tr. 1891-92, 2602. Duncan also told the jury that he regarded a "large part of the exercise" as "mak[ing] sure we [had] the complete picture [in the workpaper documents] ... in case the SEC wants to look at this one day." Tr. 2482.

Employees who attended the meeting understood that the SEC was conducting an informal investigation of Enron; they nevertheless told the jury that they shared Duncan's view that it was proper to comply with the policy at this time. *See, e.g.*, Tr. 1909, 3330-31, 3350, 4900. Witnesses

[10] Duncan never testified that he expected an SEC subpoena or considered it "probable." Instead, he repeatedly testified that he believed it was no more than a "possibility" until early November. *See* Tr. 1904, 1905-08, 2480. Other Andersen witnesses shared that view. *See, e.g.*, Tr. 6097 (former SEC official); Tr. 1447-49 (SEC head of Andersen Professional Standards Group).

testified that, consistent with Duncan's guidance, they attempted to "complet[e] [the] audit documentation" by "making sure everything that went into the accounting issues and the conclusion was documented and available in the work papers." Tr. 4918. The concern was "one of inclusion rather than exclusion." *Id.* Although the team shredded nearly "two tons of paper" in the process of reviewing the files (Pet. App. 6a), employees testified that they did not seek to destroy or fail to preserve any harmful information.[11] As one manager explained, once an audit file had been properly compiled, "it's all in the audit work papers" so "you don't need" anything else. Tr. 3336. Indeed, the Government was unable to identify a single harmful document that was not ultimately produced to the SEC. Efforts to comply with the document policy continued until November 8, 2001, when the SEC issued a subpoena to Andersen for Enron-related documents. Pet. App. 6a-7a.[12]

3. The SEC subpoena was issued the same day that Enron filed a restatement reducing its net income for the years 1997-2000 by $586 million. Tr. 4583, GX 1040A. This restatement, however, was *not* attributable to accounting issues associated with the Raptors' issues Andersen had been reviewing. When Andersen applied the proper methodology for the Raptors, it was determined that no restatement was necessary. Tr. 4528-33, 5645-46. And Duncan testified that he was fairly sure by October 16, 2001—more than a week before he discussed the document retention policy with his staff—that a restatement would

[11] Andersen proffered evidence at trial that the volume of shredded documents represented less than 3% of the records retained by the engagement team. Tr. 5468-71; R. 1115-16. The district court held this evidence inadmissible and the Fifth Circuit affirmed. Pet. App. 7a-9a.

[12] The SEC sent a second letter to Enron on October 30, 2001. Pet. App. 6a. The Court's opinion erroneously states that the letter "request[ed] accounting documents." *Id.* The letter requested Enron make certain public disclosures; it did not request documents. GX 1030A; Tr. 1945. The Government did not, in any event, identify any acts of "corrupt[] persua[sion]" that occurred after this letter was sent.

not be required due to the use of the wrong impairment methodology for the Raptors. Tr. 1794-95.

On November 2, 2001, however, Andersen learned for the first time that Enron had withheld information from it concerning an entity known as Chewco. Tr. 6148-49. Andersen immediately investigated the facts and informed Enron on November 5, 2001 that a restatement of earnings would be required due to the Chewco information. Tr. 5920-23. Thus, a properly instructed jury could have found that requests by Nancy Temple and David Duncan to comply with the document retention policy preceded the date when they learned that a restatement of the income statements (and thus a formal SEC investigation) was likely.

4. Based on this record, a jury also could not find that Andersen employees corrupted coworkers by persuading them to commit independent violations of the law. All of the requests by Andersen employees for compliance with the policy preceded the date when the SEC commenced an "official proceeding," by instituting a formal investigation. Tr. 505-08; *see* 18 U.S.C. § 1505 (limiting the crime of obstruction to destruction of documents during "pending" agency proceedings). Nor did the Government prove that soliciting compliance with the policy constituted an unlawful effort to conceal knowledge of a crime.[13] Andersen employees testified that they did not believe that Enron had engaged in criminal conduct until early November when they learned that Enron had withheld material information from Andersen concerning Chewco. *See, e.g.*, Tr. 1950. Indeed, the Government has charged Enron executives with misleading Andersen during the course of the audit.[14] To this day, neither Andersen nor any of its partners have ever been charged criminally or by the SEC with violations of the

[13] *See* 18 U.S.C. § 3 (penalizing a person who "knowing that an offense against the United States has been committed ... assists the offender in order to hinder or prevent his apprehension, trial or punishment").

[14] Superseding Indictment at 49-53, *United States v. Causey*, No. H-04-25 (S.D. Tex. July 7, 2004); *see also* Second Amended Complaint at 45-47, 50-51, *SEC v. Lay*, No. H-04-0284 (S.D. Tex. July 8, 2004).

securities laws in connection with their work for Enron.

Proceedings On Appeal

On appeal, Andersen renewed its challenges to the jury instructions and the Fifth Circuit concluded that the district court properly interpreted the elements of the offense.

1. The Fifth Circuit held that it would join the "majority of circuits ... defining 'corruptly' in terms of improper purpose despite the dim light it casts upon its meaning, its circularity aside." Pet. App. 19a. The Court recognized that the Third Circuit had squarely held that the term "corruptly" in § 1512(b) cannot be defined as an "improper purpose" but was "unwilling to follow the Third Circuit's lead in imposing a requirement for an additional level of culpability on Section 1512(b)." *Id.* at n.17.

The Fifth Circuit justified its decision to adopt a "circular[]" definition that casts only a "dim light" on the meaning of the most critical term in a criminal statute based upon legislative history that does not even include a direct endorsement of the Court's definition. Pet. App. 19a, 22-23a. And it rejected the Third Circuit's view that the term "corruptly" is "'render[ed] ... surplusage'" if defined to mean only the "improper purpose" of "'hinder[ing] communication to law enforcement.'" Pet. App. 19a n.17, 20a (quoting *United States v. Farrell*, 126 F.3d 484, 490, 487 (3d Cir. 1997)). The Court recognized that § 1512 specifically requires an "'intent to impair the ... integrity or availability [of an object] for use in an official proceeding'" *in addition to* "corrupt[]" persuasion. Pet. App. 21a. It nevertheless concluded that an "intent to impede the fact-finding" of an agency proceeding "implies a degree of personal culpability beyond a mere intent to make documents unavailable" for use in that proceeding. *Id.* at 21a-22a.[15]

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[15] The Court also states that the failure to require the jury to find a "violation of an independent legal duty" should be regarded as "harmless error." Pet. App. 24a-25a. But its explanation indicates that it only meant that "corruptly" is not mere surplusage. The government never argued—at trial or on appeal—that any Andersen employee was requested to commit an independent violation of the law or that the verdict could be upheld if the jury instruction on "corruptly persuades" was erroneous. *See* Brief for the United States at 73-92 (May 27, 2003).

The Fifth Circuit also rejected Andersen's further argument that "[c]onduct undertaken with a genuine belief that it is proper is not 'corrupt.'" Brief of Appellant at 67 (Mar. 24, 2003). The Court recast the argument as a request for an "'ignorance of the law' instruction," and rejected it on the ground that "knowledge of one's violation is not an element of § 1512(b)(2)." Pet. App. 29a.

2. The Fifth Circuit also rejected Andersen's challenge to the "official proceeding" instructions. It recognized that it had previously described the nexus mandated by § 1512 to require proof of an "'intent to affect ... some particular federal proceeding that is ongoing or is scheduled to be commenced in the future.'" Pet. App. 26a (quoting *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.), *cert. denied*, 501 U.S. 1209 (1991)). It nevertheless characterized that statement as "dicta," *id.*, and held that no proof of nexus to a particular proceeding is required. It also concluded that this case was "tried on the theory" that Andersen intended to impede "a proceeding of the SEC." *Id.* at 27a-28a.

The Court did not address Andersen's further argument that the instructions erroneously defined an "official proceeding" to include informal SEC investigations, and thereby required the jury to find that Andersen knew that an "official proceeding" of the SEC had already begun at the time of the alleged acts of "corrupt[] persua[sion]." Even though the Court elsewhere appears to adopt Andersen's view that "[p]ossible proceedings" only "became a reality on November 8, 2001" when Andersen received a subpoena, Pet. App. 5a, it never explains why this instructional error, which the Government never even contended was harmless, did not require reversal of the conviction.

REASONS FOR GRANTING THE WRIT

This Court has held for more than a hundred years that Americans are not required to retain every document that comes into their possession that might, at some point, be of

interest to a government investigation—and that disposing of such documents prior to the actual initiation of judicial proceedings is not "corrupt" behavior punishable as obstruction of justice, because "a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct." *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (citing *Pettibone v. United States*, 148 U.S. 197, 207 (1893)). That fundamental principle is reflected in the document retention policies adopted by virtually every American corporation or professional firm of any size. The United States recognized that under these basic principles it simply was not obstruction of justice for Arthur Andersen to dispose of any of these documents when it did. Indeed, the United States has essentially conceded that the persons who discarded these documents committed no crime whatsoever.

In its zeal to convict Andersen of something in the wake of Enron's collapse, the United States therefore instead charged Andersen with "witness tampering," on the remarkable theory that it is inherently "corrupt" criminal behavior in this country to attempt to *persuade* another person to engage in perfectly lawful conduct, if one of the objects of that persuasion is to frustrate the fact-finding ability of a potential future government proceeding. Although it was perfectly lawful for Andersen to have a document retention policy that preserved only the final audit workpapers, and perfectly lawful for Andersen's employees and professionals to follow that policy, the United States argued that it was somehow a serious felony for Andersen's in-house attorney and supervisors to remind its employees of the policy—even if they honestly and sincerely believed that their own speech was entirely lawful, and even if there was not the slightest hint of coercion, intimidation, or bribery in their persuasive speech.

The Fifth Circuit endorsed that novel theory only by torturing the language of the witness tampering statute, and by disregarding two fundamental Due Process principles: that ambiguities in criminal statutes are always resolved in favor of the defendant, and that no one may be

convicted of a crime without fair notice that their conduct was criminal. The Fifth Circuit's holding deepens an existing, acknowledged circuit split. It also works a sea change in the law of obstruction of justice, posing serious risks of prosecution for virtually every company that maintains a document retention policy—as well as for a wide range of other conduct commonly regarded as lawful and even constitutionally protected. And it unjustly destroyed a proud and venerable American institution: a professional accounting firm that served leading American companies for nearly a century, and, with the Andersen member firm network, once employed more than 85,000 people.[16]

This decision has been very closely watched, will be enormously influential, and is profoundly wrong. And the Fifth Circuit's suggestion that the core meaning of this important criminal statute can be deferred to future case-by-case development deprives firms of the clear rules so essential to the fair administration of the criminal law. Certiorari is warranted.

I. THE FIFTH CIRCUIT'S INTERPRETATION OF § 1512 DEEPENS AN EXISTING CIRCUIT SPLIT AND CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS

A. The Fifth Circuit's Analysis Conflicts With A Century Of Precedent Interpreting The Federal Obstruction Statutes

1. An overview of the history and interpretation of the general federal obstruction statutes helps to place the Fifth Circuit's decision in its proper jurisprudential context.

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[16] The United States has never charged Andersen, or its partners, with any offense relating to the quality of its accounting on the Enron matter, and academic commentators have noted that Andersen in fact had the *lowest* rate of restatements among the major accounting firms from 1997 to 2001. Theodore Eisenberg & Jonathan R. Macey, Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firms' Audits of Large Clients, Research Paper No. 287, at 14 (2003) (unpublished manuscript, on file with Yale Law School), *available at* papers.ssrn.com/abstract=468761

18 U.S.C. § 1503. The basic federal obstruction of justice statute, 18 U.S.C. § 1503, has two clauses.[17] The first prohibits "corrupt" or coercive efforts to "influence, intimidate, or impede" jurors and other actual officers of a court. (That clause once covered witnesses, but no longer does.) The second "omnibus" clause more broadly prohibits all "corrupt[]" or coercive attempts "to influence, obstruct, or impede, the due administration of justice."

For more than a century, however, this Court has consistently interpreted § 1503 to apply only when a judicial proceeding is actually pending, the defendant knows it, and the defendant specifically intends to obstruct that proceeding. This Court held as early as *Pettibone v. United States*, 148 U.S. 197, 207 (1893), that "while, with knowledge or notice of [a pending proceeding], the intent to offend accompanies obstructive action, *without such knowledge or notice the evil intent is lacking.*" (Emphasis added.) A defendant who intentionally interferes with a mere police investigation (whether by lying to the police, destroying documents, or misleading or bribing potential witnesses) therefore "necessarily lack[s] the evil intent to obstruct" justice, *Aguilar*, 515 U.S. at 599, unless he knows that a judicial proceeding is pending and intended to obstruct *it*.

The facts of *Aguilar* demonstrate how carefully this Court has protected that line between mere interference with the government's investigative fact-finding ability, and corrupt obstruction of justice. The defendant in *Aguilar* was a federal judge who intentionally lied to FBI agents interviewing him about leaks concerning a federal wiretap. Aguilar asked the agents if he was the target of a grand jury investigation, and they confirmed that "[t]here is a Grand Jury meeting" and that "some evidence will be heard ... I'm sure on this issue." *Id.* at 600. Nonetheless this Court reversed the conviction, holding that Judge Aguilar

[17] The statute now codified as § 1503 derives from similar federal statutes on the books since 1831. *See United States v. Poindexter*, 951 F.2d 369, 380 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992).

"necessarily lacked the evil intent to obstruct," *id.* at 599, despite the jury's verdict, because there was no evidence that he knew that those particular FBI agents would ever testify before the grand jury. Of course there is always a strong possibility that FBI agents will convey information to a sitting grand jury, and Judge Aguilar certainly knew that. But this Court stressed that the fact that the agents "might or might not" ultimately give testimony was not sufficient to make his deliberate deception a criminal act. *Id.* at 600.

That requirement of a close "nexus" between the defendant's conduct and a pending proceeding is a crucial part of the *mens rea* for obstruction of justice. *Id.* at 599. It is also essential to the constitutionality of the statute. A pending judicial proceeding helps to supply fair warning of potential criminality, because intentional interference with a pending proceeding is more commonly understood to be *malum in se*. Outside that context, individuals often pursue a wide range of conduct designed "to impede the fact-finding ability" of some potential proceeding, based on a common understanding that such conduct falls within the bounds of legitimate self-defense under the law. In the absence of a specific duty imposed by a subpoena or the unambiguous command of a statute, there is nothing inherently corrupt about failing to facilitate a future government inquiry. That is a hallmark of a free society and the reason that our legal system is frequently described as "adversary." This Court specifically rejected the notion, urged by the dissent in *Aguilar*, that "*any* act, done with the intent to 'obstruct ... the due administration of justice,' is sufficient to impose criminal liability." *Id.* at 602. This Court reasoned that such a rule would criminalize conduct when "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability." *Id.*

It is also significant that § 1503 was long used to prosecute witness tampering, but was not understood to criminalize polite requests to engage in lawful conduct. *See infra*, 23-24 & n.23. As the D.C. Circuit explained after

reviewing the history, "[m]any interpretations of the statutory language in general, and of the term 'corruptly' in particular, have been suggested, but most converge" on a reading that "would reach only a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty." *Poindexter*, 951 F.2d at 385.

18 U.S.C. § 1505. A parallel statute punishes anyone who "corruptly, or by threats or force, ... endeavors to influence, obstruct, or impede ... any pending proceeding ... before any department or agency of the United States," such as the SEC. It expressly requires both a "pending proceeding" and proof that the conduct was "corrupt."

18 U.S.C. § 1512. The statute directly at issue here was added as part of the Victim and Witness Protection Act of 1982 ("VWPA"), Pub. L. No. 97-291, 96 Stat. 1248. Section 1512 broke with prior law by permitting prosecution for witness tampering when no "official proceeding" was yet pending. As originally enacted, however, § 1512 prohibited only the use of force, threats, intimidation, or deception with the intent to interfere with a federal proceeding. And because the VWPA also amended § 1503 to delete any reference to witnesses, the Second Circuit concluded that witness tampering could henceforth be prosecuted *only* under § 1512—and that non-coercive, non-misleading conduct therefore was no longer a crime at all, even if it involved plainly wrongful acts like urging or even bribing a witness to lie to an already pending proceeding. *See United States v. Hernandez*, 730 F.2d 895 (2d Cir. 1984).

In response, Congress amended § 1512 to punish anyone who "knowingly uses intimidation or physical force, threatens, *or corruptly persuades* another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to" make evidence or testimony unavailable to an official proceeding. 18 U.S.C. § 1512(b) (2000) (emphasis added). Senator Biden explained that the italicized language was necessary because, under then-existing law, "promising to pay a witness for giving false

testimony is not a crime." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988). He offered examples of "corrupt persuasion," which he said "include preparing false testimony for [a] witness, or offering a witness money in return for false testimony." *Id.* Nothing in the legislative history suggests that Congress intended to criminalize "persuasion" that did not involve conduct that is *malum in se*, such as bribery or urging a witness to lie.

2. At the time that Andersen engaged in the challenged conduct, therefore, destroying documents in anticipation of a judicial or agency proceeding that had not yet commenced was not criminal at all.[18] Until the 1988 amendments, the "witness tampering" prohibited by § 1512 prior to the start of formal proceedings encompassed only coercive or deceptive conduct; after those amendments it also prohibited non-coercive "persuasion" only if it was "corrupt" in nature. Consistent with that background law, virtually all companies of any size adopted document retention policies that permit or require the destruction of potentially harmful materials prior to the initiation of actual proceedings or the receipt of a subpoena. And citizens regularly engage in a range of other actions which, although specifically intended to impede the fact-finding ability of some future proceeding, are commonly understood to be lawful and appropriate.

The Fifth Circuit held in this case that the addition of "corruptly persuades" to § 1512 put the world on notice that it was, for the first time, a serious felony to try to *persuade* another person to engage in perfectly lawful conduct, if one object of that persuasion is to impede the government's future fact-finding. That holding utterly transforms the practical law of obstruction. It criminalizes, for example:

- a polite request by one corporate employee to another to comply with the firm's document

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[18] Such conduct could be prosecuted under 18 U.S.C. § 3 if the defendant knew a crime had been committed. In the wake of this case, Congress also enacted 18 U.S.C. § 1519, which for the first time made it a crime to destroy documents with the intent to impede a federal proceeding before any such proceeding is initiated.

retention policy by discarding documents when no proceeding is pending, even though either employee could lawfully discard those same documents;

- advice to a friend not to comply with a *voluntary* request from the SEC or FBI for documents;
- an employer's instruction that employees construe a document subpoena literally rather than broadly; or
- a mother's efforts to persuade her son to invoke his Fifth Amendment rights not to testify.

An interpretation of a criminal statute that confers such broad discretion on prosecutors to impose criminal sanctions without fair warning must be rejected, and other circuits have done just that.

B. The Fifth Circuit's Interpretation Of "Corruptly Persuades" Conflicts With The Law Of The Third And D.C. Circuits

The Fifth Circuit's erroneous interpretation of § 1512 deepens an existing, acknowledged split between the Third and D.C. Circuits and the Second and Eleventh Circuits.

1. In *Poindexter*, the D.C. Circuit reversed the defendant's conviction for "corruptly" obstructing a congressional inquiry by lying to Congress in connection with the Iran-Contra affair. The court held that "on its face, the word 'corruptly' [in § 1505] is vague" and that "in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" 951 F.2d at 378 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The D.C. Circuit also held that words like "'improper' are no more specific—indeed they may be less specific—than 'corrupt.'" *Id.* at 379. After canvassing the historical interpretation of the term "corruptly" in the obstruction statutes, the D.C. Circuit concluded that § 1505 applied only to a person "who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty." *Id.* It then held that simply lying to Congress does not satisfy that standard.[19]

[19] Congress responded to *Poindexter* by amending 18 U.S.C. § 1515(b) to provide that "[a]s used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." That amendment reverses the narrow holding of *Poindexter* by making it clear that lying to Congress violates the statute. It could not, of course, alter the D.C. Circuit's constitutional analysis that "corrupt" must mean something more than "improper" to survive Due Process review. In any event, Congress expressly limited that definition to § 1505 which, unlike § 1512, requires knowledge of a pending official proceeding.

In *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1131 (1997), a defendant charged with witness tampering by "corrupt[] persua[sion]" argued, citing *Poindexter*, that § 1512 would also be unconstitutionally vague unless "corruptly" were read to require improper means such as bribery. The D.C. Circuit agreed that "the two statutes are sufficiently similar to support [the same] interpretation of the word 'corruptly' in § 1512(b)." The court held that the defendant in *Morrison* nonetheless acted "corruptly," because he urged a witness to testify falsely under oath. The D.C. Circuit thus held that a conviction for "corruptly persua[ding]" under § 1512 requires proof that the persuader either used wrongful means like bribery, or urged another to violate the law.

2. The Third Circuit has also held that "corruptly" in § 1512 does not mean acting with "an improper purpose." In *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), the defendant was caught selling adulterated meat and tried to persuade one of his coconspirators that they should "stick together." Farrell was convicted of "corruptly persuad[ing]" his coconspirator to withhold information, but the Third Circuit reversed the conviction. The court first held that "the phrase 'corruptly persuades' [is] ambiguous," and that it "cannot mean simply 'persuades with the intent to hinder communication to law enforcement' because such an interpretation would render the word 'corruptly' meaningless" and "[t]he Supreme Court has cautioned that courts should give meaning to all statutory terms, especially those that 'describe an element of a criminal offense.'" 126

F.3d at 487 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994)). The court also explicitly rejected the government's argument that "corruptly" means "motivated by an improper purpose." *Id.* at 489-90. It pointed out that "because the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage." *Id.* at 490. The Third Circuit held that "corruptly" necessarily requires more culpability than the mere "intent to hinder an investigation." *Id.* at 489. The court also noted that even if that were not the most reasonable reading of the statute it was certainly permissible, and therefore required by the rule of lenity. *Id.*

After reviewing the legislative history of § 1512, the Third Circuit concluded, like the D.C. Circuit, that "both attempting to *bribe* someone to withhold information and attempting to *persuade* someone to provide *false information* ... constitute 'corrupt persuasion' punishable under § 1512(b)." *Id.* at 488. The court declined to resolve in *Farrell* whether some conduct outside those categories might be "corrupt," because it was certain that the statute *did not* cover the conduct with which Farrell was charged—"a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators." *Id.*

The Third Circuit returned to this issue in *United States v. Davis*, 183 F.3d 231 (3d Cir. 1999), and squarely held that a conviction secured through a jury instruction that defined "corruptly" as an "improper purpose" had to be reversed. In *Davis*, the defendant attempted to get his wife's ex-boyfriend, a mafia turncoat working with the FBI, killed by revealing the ex-boyfriend's status as an informer to his criminal associates. The district court instructed the jury that "[t]he word 'corruptly' means having improper motive or purpose of obstructing justice." *Id.* at 250 n.6. Citing

Farrell and *Poindexter*, the Third Circuit held that an "improper purpose," is "insufficient ... to justify a conviction" under § 1512. *Id.* at 250. The court held that the defendant could perhaps be convicted under § 1512 on remand because he may have urged another to violate the law (by killing his wife's ex-boyfriend), but instructed the district court to "clarify [to the jury] that 'corrupt persuasion' involves more than an improper motive, and includes inducements to violence." *Id.* at 250 & n.6.[20]

3. The Fifth Circuit offered no persuasive reason to reject the interpretation of "corruptly persuade" adopted by the Third and D.C. Circuits. *First*, the plain meaning of the term "corrupt" is "'depraved, evil: perverted into a state of moral weakness or wickedness ...; characterized by bribery, the selling of political favors, or other improper political or legal transactions.'" *Poindexter*, 951 F.2d at 378 (citation omitted). The legislative history of § 1512 and the other obstruction statutes suggests that at least the core meaning of "corrupt" is "actions that 'corrupted' another person," *i.e.*, that induced them to commit violations of the law. *Id.* at 380, 385; 134 Cong. Rec. S17,369 (explaining that it was necessary to add "corruptly persuades" to ensure that "the corruption of a witness" could be prosecuted). Regardless, the term clearly requires some conduct that is *malum in se*.

The *Poindexter/Farrell* interpretation guarantees that a defendant could not be convicted under § 1512 without the "depraved," "evil," or "wicked" state of mind fairly required by the plain meaning of "corruptly." The instruction approved by the Fifth Circuit here does not. Interpreting another statute that required a "corrupt[] endeavor," this

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[20] *Davis* explained that equating "corruptly" with an "improper purpose" would mean that "a lawyer's instruction to a client not to speak to potential government witnesses, including government investigators, would ... constitute witness tampering," except that § 1515(c) creates a defense for lawyers. "A defendant's husband or mother ... would not fall within this safe harbor if he or she advised a defendant to keep silent when approached by potential witnesses." 183 F.3d at 248. The Court thought it obvious Congress did not intend to criminalize such conduct.

Court held in *Aguilar* that a defendant's "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability" even though he lied to the FBI with the specific "intent to 'obstruct ... the due administration of justice.'" 515 U.S. at 602.

Second, the Fifth Circuit's reading renders the overall scheme of the federal obstruction statutes as written in 2001 positively nonsensical. Section 1512 covered certain acts that cause *others* to destroy evidence, but not a defendant's own destruction of evidence. Because the statutes covering a defendant's *own* conduct applied only when a proceeding was pending, the upshot of the Fifth Circuit's holding is that in October 2001 David Duncan was free to throw his own documents in the trash; his secretary was free to throw those same documents in the trash; but it was suddenly a serious felony for Mr. Duncan to *ask* his secretary to throw a document in the trash. Congress surely could not have intended such a surprising interpretation.

Third, the Fifth Circuit's interpretation of "corruptly" also renders that term superfluous. Section 1512 has a separate specific intent element that already requires proof that the defendant knowingly intended to make evidence unavailable for use in an official proceeding. Yet the instructions approved by the Fifth Circuit equated "corruptly" with an "intent to impede the fact-finding ability of an official proceeding." The Fifth Circuit asserts that that somehow "implies a degree of personal culpability beyond a mere intent to make documents unavailable," but never explains how or offers a single example. As *Farrell* correctly recognized, to deprive a proceeding of evidence is, self-evidently, to interfere with its fact-finding ability.[21]

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[21] "Judges should hesitate to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Bailey v. United States*, 516 U.S. 137, 145 (1995); *see also TRW, Inc. v. Andrews*, 534 U.S. 19, 29-31 (2001) (rejecting statutory interpretation on surplusage grounds, even though section might still serve an "independent function" in "rare and egregious

And the Fifth Circuit concedes in this case that "defining 'corruptly' in terms of improper purpose" casts only "dim light ... upon its meaning," even leaving "its circularity aside." Pet. App. 19a. Thus, as *Farrell* emphasized, the rule of lenity "demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990).

Fourth, the legislative history here in no way trumps the rule of lenity. The Fifth Circuit largely rests its interpretation on Senator Biden's comment that "corruptly persuades" was added "to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." 134 Cong. Rec. S17,369. The Court echoes an assertion of the dissenting judge in *Farrell* that "Congress knew that courts had uniformly defined 'corruptly' in § 1503 as 'motivated by an improper purpose.'" Pet. App. 23a. But as the D.C. Circuit's scholarly overview in *Poindexter* makes clear, that characterization is simply incorrect: "Courts construing § 1503 have adopted a wide variety of interpretations" of the word "corruptly." 951 F.2d at 385. Indeed, the Fifth Circuit's own pattern jury instruction defines "corruptly" for § 1503 as "knowingly and dishonestly"—not an "improper purpose."[22] "Improper purpose" instructions have certainly been given in § 1503 cases, but the pending proceeding requirement makes it far less likely that a vague instruction will permit conviction without fair warning, and there was certainly no consensus that an "improper purpose" standing alone was sufficient for criminality in circumstances like those presented here.[23]

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case[s]," because canon of construction precludes interpretations that render sections of a statute "insignificant, if not wholly superfluous").

[22] Fifth Circuit Pattern Jury Instructions (Criminal Cases), Instruction No. 2.65, at 175 (2001), *available at* http://www.lb5.uscourts.gov/juryinstructions/crim2001.pdf.

[23] Every decision mentioned by Senator Biden in the legislative history, whether prosecuted under § 1503 or the pre-amendment § 1512(b), involved independently wrongful efforts to influence witnesses. *See United States v. King*, 762 F.2d 232, 237 (2d Cir. 1985) (bribery of

When Senator Biden's comments on the 1988 amendment are read as a whole, it is clear that the point was to ensure that defendants could be prosecuted for bribing witnesses and procuring false testimony—not for politely persuading them to engage in lawful conduct. *See supra* at 16-17.

4. If the Fifth Circuit had adopted the Third or D.C. Circuits' interpretation of § 1512, Andersen could not have been convicted. There is no evidence that the supposed "corrupt persuaders" in this case used bribery or any other improper means, or that they attempted to persuade anyone to do anything unlawful. The Fifth Circuit's opinion appears to begin a form of harmless error analysis by writing that "[o]n the facts of this case, that the jury was not required to find a violation of an independent legal duty did not have a substantial and injurious effect on the verdict." Pet. App. 24a-25a. But the Court actually supplies no analysis of the facts, instead reiterating its conclusion that the instructions given were correct and gave an adequate independent meaning to "corruptly." As set forth *supra* at 9 & 10 n.15, Andersen could not have been convicted under this interpretation of § 1512 and the Government *never* argued that this error could possibly be harmless on this record.[24]

Although the Fifth Circuit reads *Farrell* to stop short of fully adopting the D.C. Circuit's *Poindexter* test (Pet. App.

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witness), *cert. denied*, 475 U.S. 1018 (1986); *United States v. Vesich*, 724 F.2d 451, 453-58 (5th Cir. 1984) (persuade witness to testify falsely); *United States v. Gates*, 616 F.2d 1103, 1107 (9th Cir. 1980) (same); *United States v. Risken*, 788 F.2d 1361, 1367 (8th Cir.) (attempt to have one witness killed and to mislead another), *cert. denied*, 479 U.S. 923 (1986); *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984) (hiding a witness under an obligation to testify); *United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984) (threat to kill a witness).

[24] The use of jury instructions that misinterpreted the elements of a criminal offense requires reversal unless the error is harmless beyond a reasonable doubt—a standard that could not be satisfied here. *See, e.g., Neder v. United States*, 527 U.S. 1, 10 (1999) (finding that a conviction must be reversed when an instruction involves either "misdescriptions" or "omissions" of an element of the offense unless the error is harmless beyond a reasonable doubt); *United States v. Walls*, 225 F.3d 858, 867 (7th Cir. 2000) (same).

20a-21a), we do not believe that is a fair reading of Third Circuit law after *Davis*.[25] Regardless, both *Farrell* and *Davis* make it crystal clear that the instructions given in this case—defining "corruptly" as an "improper motive" and an intent to "impede the fact-finding ability of an official proceeding"—are improper. *Farrell* and *Davis* squarely hold that an "improper motive" or an "'intent ... to hinder an investigation'" are insufficient for conviction. *See Davis*, 183 F.3d at 250 & n.6 (quoting *Farrell*, 126 F.3d at 489). That conclusion is also plainly required by this Court's opinion in *Aguilar*, which held that "an intent to 'obstruct ... the due administration of justice,'" is not alone sufficiently wrongful to give fair warning of criminality. 515 U.S. at 602.

As the Fifth Circuit notes, Pet. App. 19a n.17, the Second and Eleventh Circuits have expressly rejected the *Farrell/Poindexter* interpretation of § 1512 and have held that something like an "improper purpose" is sufficient. *See United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999); *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996); *see also United States v. Khatami*, 280 F.3d 907 (9th Cir.) (acknowledging conflict), *cert. denied*, 535 U.S. 1068 (2002). The Fifth Circuit's opinion in this case therefore deepens an existing, acknowledged circuit split. It bears mention, however, that the Eleventh Circuit instruction requires that the defendant act "knowingly *and dishonestly* with the specific intent to subvert or undermine the integrity or truth-seeking ability of an investigation." *Shotts*, 145 F.3d at 1301 (emphasis added). Andersen requested a similar "acting dishonestly" instruction in this

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[25] In *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999), the Third Circuit affirmed the § 1512 convictions of defendants who hired someone to paint over a blood-spattered wall. The defendants apparently did not argue that their conduct was not "corrupt," and the panel gave no indication that it was reconsidering *Farrell* or *Davis*. In any event, the defendants in *Applewhaite* knew that a crime had been committed and were therefore soliciting conduct that would have been unlawful for them to engage in. *See supra* at 9 n.13. Andersen had no such knowledge. *See supra* at 9.

case, because the jury certainly could have concluded that there is nothing "dishonest" about openly reminding fellow employees to comply with a lawful document retention policy. The district court refused. Tr. 4316-19. Andersen accordingly could have prevailed under Eleventh Circuit law as well.

C. The Fifth Circuit's Refusal To Require Proof Of Conscious Wrongdoing And A Close Nexus To A Particular Proceeding Criminalizes Conduct Without Fair Warning And Conflicts With The Law Of The First Circuit

The spare phrase "corruptly persuades" is plainly insufficient to place a person of common intelligence on notice that the conduct prosecuted here—politely asking another person to do something that either of you could lawfully do independently—is a crime. As *Aguilar* instructs, the doctrine of constitutional doubt requires that *some element* of § 1512 must be narrowed to ensure that no one is convicted without fair warning. The *Farrell/Poindexter* interpretation of "corruptly persuades" cures that difficulty, but the statute should be narrowed in other ways. The First Circuit has required proof of conscious wrongdoing and a close nexus to a particular official proceeding, but the Fifth Circuit rejected those limitations.

1. The Fifth Circuit's refusal to read "corruptly persuades" to at least require proof of conscious wrongdoing cannot be reconciled with this Court's decision in *Ratzlaf* and *Bryan v. United States*, 524 U.S. 184 (1998). Andersen proposed that the defendant must have some consciousness that its conduct was "wrongful" and the plain meaning of "corruptly" surely requires at least that. The Fifth Circuit disagreed on the ground that ignorance of the law is no defense. In *Bryan*, however, this Court stressed that requiring such basic consciousness of wrongdoing "does not carve out an exception to the traditional rule that ignorance of the law is no excuse." 524 U.S. at 196.

In addition, the usual presumption against "ignorance of the law" defenses assumes that criminal statutes are not interpreted so broadly that a person could be convicted in the absence of some fair warning—from the conduct, surrounding context, or plain language of the statute—that the line into criminal behavior was being crossed. In *Ratzlaf*, this Court interpreted "willfully" in the anti-structuring statutes to require actual knowledge of the law because that statute criminalized conduct that was not "obviously 'evil'" or "inevitably nefarious." 510 U.S. at 144-46.[26] That conduct—"structur[ing] cash transactions 'for the specific purpose of depriving the Government of the information that [the currency reporting statute] is designed to obtain,'" is if anything more obviously culpable than the conduct criminalized in this case. *Id.* at 144 (citation omitted). And this Court has already held that an intent to obstruct justice is not in itself obviously wrongful. *Aguilar*, 515 U.S. at 602. If § 1512 is to be interpreted in a manner that creates the same problem as in *Ratzlaf*, then Andersen was entitled to an instruction requiring (at least) some consciousness of wrongdoing. Consistent with this guidance, the First Circuit held in *United States v. Frankhauser*, 80 F.3d 641, 652 (1996), that there was sufficient evidence of "corrupt intent" in a § 1512 case because a "prior conviction for [obstruction] by advising the destruction of documents gave [the defendant] notice that his advice ... was illegal."

2. The official proceeding instructions also impermissibly broadened the statute in two basic respects.

First, Andersen objected to the lack of any "nexus" element in the instructions that would require some

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[26] *Ratzlaf* is not limited to statutes containing the *mens rea* term "willfully." This Court recognized that "willfully" is a "'word of many meanings,'" *Ratzlaf*, 510 U.S. at 141 (citation omitted), and grounded its holding on the fact that the statute would otherwise criminalize conduct that a reasonable person could believe to be lawful. This Court held that "knowingly" required knowledge of illegality in *Liparota v. United States*, 471 U.S. 419 (1985), for similar reasons. If anything, the word "corruptly" connotes a greater consciousness of wrongdoing than "willfully" does.

meaningful connection between Andersen's conduct and some concretely expected official proceeding. As set forth, much of the fair warning in the traditional obstruction statutes has been supplied by the context of a pending judicial proceeding. And *Aguilar* suggests that, in this context, knowledge that a proceeding is at least "likely" or "probable" is required for criminality. 515 U.S. at 599-600. Four circuits have squarely addressed the issue of how "concrete[] ... the defendant's expectation of a proceeding" must be to sustain a conviction under § 1512. Pet. App. 26a. Two have sided with the decision below and declined to extend this Court's reasoning in *Aguilar* to § 1512.[27] The First Circuit, however, has held that even though § 1512 provides that the proceeding need not actually be pending, it nonetheless requires at least some "intent to impair an object's availability for use in a *particular* official proceeding" and should not be read to permit conviction based on proof that the defendant "may have foreseen an official proceeding at some time in the future." *Frankhauser*, 80 F.3d at 651-52. The First Circuit instead upheld a § 1512(b) conviction because there was "direct evidence that [the defendant] *in fact expected* a grand jury investigation and/or a trial in the foreseeable future." *Id.* (emphasis added).

The Fifth Circuit nevertheless upheld an instruction in this case that required no nexus. R. 1253. The Court recognized that its prior precedent in *Shively* described the required nexus as proof of an intent to affect a "particular," "ongoing," or "scheduled" proceeding, 927 F.2d at 812-13; that Andersen's overall nexus argument was "not without force"; and that the lack of a nexus requirement could potentially permit convictions for "maintaining records

[27] *See United States v. Gabriel*, 125 F.3d 89, 104-05 (2d Cir. 1997) (refusing to extend *Aguilar* to § 1512, holding instead that the government need only prove "intent to interfere with ... potential" testimony in official proceedings); *United States v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994) (holding that § 1512 only requires that the defendant "fear[] that a ... proceeding had been or might be instituted").

retention programs which were adopted with no proceeding in mind." Pet. App. 27a.[28] It nevertheless read the statute to foreclose any required proof of nexus because § 1512(e)(1) provides that the proceeding "need not be pending or about to be instituted at the time of the offense."

That error was not harmless. Although the Court found that "the SEC was the feared opponent," it *did not* conclude that the record compelled the conclusion that Andersen "'knew that the SEC was coming.'" Pet. App. 28a (citation omitted). Nor could it have. As explained *supra*, Andersen employees did not believe an income restatement (and thus a formal SEC investigation) was "likely" until *after* all of the alleged acts of corrupt persuasion occurred. The jury that declared itself deadlocked surely might have acquitted if it had been instructed that the official proceeding must be "scheduled," or "particular," or "expected," or "likely," or any other formulation capturing the basic notion that a concern about possible future proceedings is not enough. *See supra* at 4-9.[29]

Second, the instructions wrongly told the jury that an official proceeding included informal SEC investigations. Pet. App. 25a n.32. As a consequence, the jury was

[28] Andersen sought to require a meaningful "nexus" between its conduct and some concretely contemplated official proceeding by requesting an instruction in reliance on *Shively* that the proceeding must be at least "ongoing or scheduled." R. 426. Andersen also maintained that the jury should at least be given an instruction that it could convict only if Andersen intended to impede "a *particular* [official] proceeding." R. 1122-23; Tr. 4339-42. Even if neither of those formulations precisely tracks the interpretation ultimately adopted by this Court, Andersen clearly preserved its objection on this issue. *See United States v. Jones*, 909 F.2d 533 (D.C. Cir. 1990) (R. Ginsburg, J.) (instruction describing element of criminal offense requires reversal unless harmless beyond a reasonable doubt, even though instruction proffered by defendant was also incorrect).

[29] In addition, the instructions allowed the jury to convict Andersen merely for having a document retention policy. The prosecution forwarded that theory explicitly by arguing that a videotape which did not relate to Enron was "corrupt[] persua[sion]," and the jury asked to see that tape during their deliberations. Pet. App. 27a.

instructed that an "official proceeding" *was already pending* during the relevant period. Andersen argued that was incorrect as a matter of law, and that no "official proceeding" began until the SEC opened a formal investigation on October 30.[30] The Fifth Circuit's analysis suggests that it agreed, but never addressed the significance of the error. Yet that error transformed the case. The government obviously did not believe that was true, or it would have charged Andersen with a violation of § 1505 rather than this convoluted witness tampering theory. But having obtained the incorrect instruction, the government played it to the hilt—beginning its closing by telling the jury that "an official proceeding includes both an informal and formal inquiry of the SEC" and that there was no dispute "that there was an SEC proceeding ongoing at the time the document destruction occurred." Tr. 6352. Because that error entirely removed the nexus issue from the jury, and because the jury might have concluded that Andersen's conduct was "corrupt" only because a proceeding was pending, it cannot have been harmless.

The instructions upheld by the Fifth Circuit in this case accordingly conflict with decisions of this Court and other Circuits in several fundamental respects. In combination, they read § 1512(b) to permit convictions for speech that a reasonable person would not understand to be unlawful. And the extraordinary harm caused by this wrongful prosecution starkly demonstrates the need for this Court to resolve these recurring issues of central importance to the fair administration of the obstruction laws.

CONCLUSION

The petition for certiorari should be granted, and the conviction should be reversed.

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[30] Courts have held that preliminary inquiries by agency staff, which are not authorized by a formal vote and do not have subpoena power, are not official proceedings. *See Kelley*, 36 F.3d at 1127; *see also United States v. Senffner*, 280 F.3d 755, 761 (7th Cir.), *cert. denied*, 536 U.S. 934 (2002). Such inquiries also do not meet the definition of a "proceeding" under the SEC's own regulations. *See* 17 C.F.R. § 201.101(a)(9).

Respectfully submitted,

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APPENDIX

[United States Court of Appeals]
[Fifth Circuit]
[FILED]
[June 16, 2004]
[Charles R. Fulbruge III]
[Clerk]

REVISED June 24, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21200

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR ANDERSEN, LLP,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Today we decide one of the many cases arising from the rubble of Enron Corporation, which fell from its lofty corporate perch in 2001 wreaking financial ruin upon thousands of investors, creditors, and employees. Like a falling giant redwood, it took down with it many members of

its supporting cast. Our present focus is upon one of those, Arthur Andersen, LLP, then one of the largest accounting and consulting firms in the world.

Arthur Andersen appeals from a judgment of conviction entered in the Southern District of Texas upon a jury verdict finding it guilty of obstructing an official proceeding of the Securities and Exchange Commission, in violation of 18 U.S.C. § 1512(b)(2). The indictment leading to the conviction was returned on March 7, 2002, charging Andersen in a single count of corruptly persuading one or more Andersen personnel to withhold, alter, destroy, or conceal documents with the intent to impair their availability in an official proceeding. That proceeding, which the government said Andersen knew was imminent and inevitable, was an investigation by the SEC into the relationship between Enron and Andersen, from whom Enron obtained accounting, auditing, and consulting services.

Trial commenced on May 6, 2002, and the verdict was returned on June 15, 2002. Writ large, the government says that Andersen, in an effort to protect itself and its largest single account, ordered a mass destruction of documents to keep them from the hands of the SEC.

Andersen asks this court to reverse its conviction, urging errors in four evidentiary rulings, misconduct by the prosecutor in his rebuttal jury summation, and two legal contentions regarding the required proof under § 1512(b)(2). The evidentiary rulings include admitting extensive evidence regarding two unrelated SEC enforcement actions against Andersen, excluding evidence of the volume of documents Andersen did not destroy, and excluding impeachment evidence. Regarding the proof required by § 1512(b)(2), Andersen urges that given its element of "corruption," the government had to prove more than that it acted with an intent to impede the SEC. Finally, Andersen asserts that the government had to prove that Andersen intended to interfere with a "particular" proceeding.

We are not persuaded that this conviction is flawed by reversible error and we affirm the judgment of conviction.

I

During the 1990's, Enron transformed itself from a natural gas pipeline operator into a trading and investment conglomerate with a large volume of trading in the energy business. Andersen both audited Enron's publicly filed financial statements and provided internal audit and consulting services. By the late 1990's, Andersen's "engagement team" for its Enron account included more than 100 people, a significant number of which worked exclusively in Enron quarters in Houston, Texas. From 1997 through 2001 the engagement team's leader was David Duncan. He was in turn subject to certain managing partners and accounting experts in Andersen's Chicago office. Enron was a valued client producing 58 million dollars in revenue in 2000 for Andersen with projections of 100 million for the next year. Enron's Chief Accounting Officer and Treasurer throughout this period came to the employ of Enron from the accounting staffs of Andersen, as did dozens of others. This was a close relationship. Indeed, the jury heard evidence that Andersen removed at Enron's request at least one accountant from his assignment with Enron after Enron disagreed with his accounting advice.

With Enron's move to energy trading and rapid growth came aggressive accounting, pushing Generally Accepted Accounting Principles to its advantage. Part of this picture included Enron's use of "special purpose entities," SPEs. These were "surrogate" companies whose purpose was to engage in business activity with no obligation to account for the activity on Enron's balance sheet. Four of these SPEs—called Raptors—play a large role in this story. They were created in 1999 and 2001, with the assistance of Andersen, largely capitalized with Enron stock. The Raptors engaged in transactions with "LJM," an entity run by Andrew Fastow, Enron's Chief Financial Officer. By late 2000 and early 2001, the traded price of Enron's stock was dropping

and some of the Raptor's investments were also turning downward. Some of the SPEs were profitable and some were experiencing sharp losses. But aggregated they reflected a positive return to Enron. GAAP would not permit such an aggregation of the four entities and Andersen's Chicago office told David Duncan that it would not—that it was a "black and white" violation. That advice was ignored and the losses were buried under the profits of the group in the public reporting for the first quarter 2001. The slide of Enron stock continued, dropping some 50% from January to August 2001.

The summer of 2001 brought problems to Andersen on other fronts, and these "unrelated" events later become important to the issues before us. In June 2001 Andersen settled a dispute with the SEC regarding Andersen's accounting and auditing work for Waste Management Corporation. Andersen was required to pay some $7 million, the largest monetary settlement ever exacted by the SEC, and Andersen suffered censure under SEC Rule 102(e). Then in July 2001, the SEC sued five officers of Sunbeam Corporation and the lead Andersen partner on its audit.

Meanwhile, events at Enron began to accelerate. On August 14, 2001, Jeffrey Skilling, Enron's CEO, resigned, pushing Enron stock further downward. Within days, Sherron Watkins, a senior accountant at Enron, formerly at Andersen, warned Enron's Chairman, Kenneth Lay, that Enron "could implode in a wave of accounting scandals." She also warned David Duncan and Michael Odom, an Andersen partner in Houston who had oversight responsibility for Duncan. Chairman Lay promptly asked Enron's principal outside legal counsel to examine the accused transactions. And by early September, senior Andersen officials and members of its legal department formed a "crisis-response" group, including, among others, its top risk manager and Nancy Temple, an in-house lawyer in Chicago assigned to Enron matters on September 28, 2001.

Possible proceedings became a reality on November 8, 2001, when Andersen received an SEC subpoena. The time line between September 28 and November 8, from a possibility of proceeding to fact, is important and we turn briefly to that narrative.[1]

On October 8, Andersen contacted a litigation partner at Davis, Polk and Wardwell in New York regarding representation of Andersen. The following day, Nancy Temple discussed the problem of Enron with senior in-house counsel at Andersen. Her notes from this meeting refer to an SEC investigation as "highly probable" and to a "reasonable possibility" of a restatement of earnings. Her notes also recorded, "without PSG agreement, restatement and probability of charge of violating cease and desist in Waste Management." Two days later, on October 10, Michael Odom urged Andersen personnel to comply with the document retention policy, noting "if it's destroyed in the course of normal policy and litigation is filed the next day, that's great ... we've followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable."

On October 12, Temple entered the Enron crisis into Andersen's internal tracking system for legal matters, labeling it "government regulatory investigation," and asked Odom if the engagement team was in compliance with Andersen's document policy. Odom forwarded the email to Duncan in Houston.

Meanwhile, Enron was facing an October 16 date for announcing its third quarter results. That release had to disclose a $1.01 billion charge to earnings and, to correct an accounting error, a $1.2 billion reduction in shareholder equity. Enron's draft of the proposed release described the charge to earnings as "non-recurring." Andersen's Chicago personnel advised that this phrase was misleading, but Enron did not change it. With one exception, Andersen took

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[1] The indictment alleged that the acts of obstruction took place between October 16 and November 9, 2001.

no action when its advice was not followed: Temple suggested that Andersen's characterization of the draft release as misleading be deleted from the email exchanges.

An SEC letter to Enron quickly followed the releases of October 16. In the letter the SEC advised that it had opened an informal investigation in August and an additional accounting letter would follow. Andersen received a copy of the letter on Friday, October 19. A Saturday morning conference of Andersen's Enron crisis group followed. While the meeting traversed a range of issues, Temple again reminded all "to make sure to follow the policy." The following Tuesday, October 23, Enron had a telephone conference with security analysts. At the same time, Duncan scheduled an "urgent" and "mandatory" meeting in Houston at which, following lengthy discussion of technical accounting issues, he directed the engagement team to comply with Andersen's records retention policy.

On October 26, a senior partner at Andersen circulated an article from the *New York Times* discussing the SEC's response to Enron. In an email, he commented that "the problems are just beginning and we will be in the cross-hairs. The marketplace is going to keep the pressure on this and it's going to force the SEC to be tough." Evidence that this prediction of SEC toughness was sound came quickly. On October 30, the SEC sent Enron a second letter requesting accounting documents—a letter signed by the two top enforcement division officials.

Throughout this period Andersen's Houston office shredded documents. Government witnesses detailed the steady shredding and deletion of documents and the quantity of paper trucked away from the Houston office. Almost two tons of paper were shipped to Andersen's main office in Houston for shredding. The government produced an exhibit at trial charting the time and quantity of the carted waste paper from January 2001 through December of that year. The pounds carted remained fairly steady at a rate under 500 pounds, but spiked on October 25 to just under 2500 pounds. The shredding continued until the SEC

served its subpoena for records on November 8. Temple advised Duncan that the subpoenae had been served. The next day Duncan's assistant advised the Houston team: "Per DAVE—No more shredding. ... We have been officially served for our documents."

Enron filed for bankruptcy on December 2, 2001. The following April, David Duncan pleaded guilty to obstructing the SEC.

II

We turn first to Andersen's claims of error in certain evidentiary rulings at trial.

1

The first such contention urges error in the district court's exclusion of Andersen's evidence of the volume of documents retained by the engagement team that were either not deleted or recaptured and produced to the SEC. This evidence was relevant, Andersen argues, because it is inconsistent with the charge that its personnel were "corruptly persuaded" to destroy documents and delete emails to keep them from the SEC. Andersen's explanation for the shredding and deleting, at least for the upward spike on October 23, was that personnel in its Houston office were attempting to clean up their files in anticipation of their examination by Chicago supervising personnel, and that the presence of multiple copies of significant documents was evidence that there was "no systematic attempt to root out embarrassing materials." The argument continues that the district court misunderstood the issue. Pointing to an in limine order, Andersen argues that Judge Harmon believed the proffered evidence inadmissible as an attempt to offer evidence that "on other occasions the defendant acted innocently," when the true thrust of the evidence was to negate the evidence that any person acting for Andersen acted corruptly and with the intent necessary to commit the charged crime.

The government replies that refusing to admit the documents into evidence was simply the court's enforcement of its pretrial ruling on discovery—that the defendant could not offer documents in trial that it had not produced for examination by the prosecution before trial; that Andersen never authenticated the documents nor by a proper predicate demonstrated that the documents not destroyed, to which it wanted to point, were relevant Enron documents. Relatedly, the government notes that other evidence was before the jury demonstrating that not all of the documents were destroyed. Finally, it argues that the evidence supporting Andersen's conviction is so powerful, that any error was not reversible error.

The government relied on the volume of documents destroyed as evidence of Andersen's intent. It follows that competent evidence countering the government's proof of the volume of shredding, as well as its timing, undeniably had some relevance. To put the issue in perspective, Andersen did not attempt to deny that it shredded large numbers of documents and for sustained periods, leaving the government's assertion to this extent largely unchallenged. Nor does Andersen's principal argument claim error in the exclusion of specific documents alleged to have been destroyed. In sum, that all documents were not destroyed and that large numbers of documents were produced to the SEC by Andersen was not challenged.[2] Some 21 boxes of Duncan's preserved desk files were introduced by Andersen and displayed to the jury. Andersen's explanation for the undeniable surge in shredding and the persistent and uncustomary reminders to employees to abide Andersen's retention policy was that it wanted to leave only the work papers of auditing efforts, and that Duncan did not want his

[2] There was a misstatement by a prosecutor regarding an email he represented to the jury was deleted and not produced by Andersen. That was corrected on the objection of the defense. We describe this event later in Part IV while addressing Andersen's claim of prosecutorial misconduct.

superiors in Chicago to face his unkempt files. That explanation pointed to the upsurge in papers trucked away shortly after he learned of his superior's planned visit to Houston. The jury was free to evaluate this testimony.

Andersen maintained at trial that it was not offering the specific documents into evidence and hence its proffer of documents not identified to the prosecution as trial exhibits before trial did not violate the pretrial order entered by the trial judge; that it wanted to place into perspective the government's evidence of the amount of paper carted away by proof of the large amount of documents produced for the SEC. The government responded at trial that the evidence would not be relevant without the predicate proof of what the documents were and that proof, if forthcoming, would put the proffer in the teeth of the pretrial preclusion order. Fine point it is, but we cannot conclude that the trial judge abused her discretion in this ruling.

Regardless, even if there was a sufficient showing that these documents were relevant to the SEC proceeding, it is clear that Andersen was denied only this particular method of demonstrating that it produced a large number of documents; that it otherwise made this showing at trial is not seriously challenged. The district court observed that there was "ample evidence already in the record that all the documents were not destroyed" and that "Andersen does not need to introduce evidence of 1660 boxes of remaining desk files to make this point." Any error was not reversible error.

In sum, we are not persuaded that the district court committed reversible error in its rulings regarding the evidence of the volume of documents destroyed or retained.

2

We turn next to Anderser's contention that the district court erred in allowing the government to offer evidence of two SEC proceedings filed against it arising out of Andersen's work with Sunbeam Corp and Waste Management, Inc. Andersen argues that the evidence of

these charges of its misconduct and their settlement was not relevant in that there was no evidence that they were connected to any "corrupt persuader," or that any partner at Andersen involved in work at Sunbeam or Waste Management was also involved with its Enron account. It concedes that while the fact of these two difficulties with the SEC offers at least "a small kernel" of relevant evidence that "could have been thought relevant," far too much detail of the unproved accusations and settlements were admitted. This excess was such that the jury could not be expected to cabin its consideration to Andersen's motive in shredding documents. Rather, the argument goes, the government was allowed to prove that Andersen was "a bad corporate actor and should be found guilty for that reason alone."

Rule 404(b) is a rule of inclusion allowing proof of prior bad acts of a defendant when the acts are relevant to an issue other than the defendant's character, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[3] When the relevance of an issue is shown, the inquiry turns to Rule 403, which requires the exclusion of the evidence if its relevance is substantially outweighed by the danger of unfair prejudice.[4] There must be a "genuine risk that the emotions of the jury will be excited to irrational behavior," and the risk must be "disproportionate to the probative value of the offered evidence."[5] We will reverse only on a clear showing of a prejudicial abuse of discretion.[6]

The government opened its case with the testimony of Thomas Newkirk, one of four associate directors in the Division of Enforcement of the SEC. He explained (1) the structure of the Agency; (2) the difference between a matter

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[3] FED. R. EVID. 404(b).

[4] FED. R. EVID. 403.

[5] *United States v. Beechum*, 582 F.2d 898, 915 n.20 (5th Cir. 1978) (quoting Trautman, *Logical or Legal Relevancy A Conflict in Theory*, 5 VAND. L. REV. 385, 410 (1952)).

[6] *United States. v. Davis*, 546 F.2d 583, 592 (5th Cir. 1977).

under investigation or MUI and a formal inquiry; (3) that a 102(e) proceeding is directed at professionals engaged in misconduct in their practice before the commission, such as lawyers or accountants; and (4) that this proceeding could result in both a prohibition of practice before the SEC and censure for unprofessional conduct. He also explained that "almost without fail" a restatement of earnings by a Fortune 500 company will prompt a formal investigation and that documents for the investigation are obtained by subpoena.

Newkirk's attention was then drawn to prior proceedings by the SEC against Andersen. He explained to the jury that Sunbeam was a public company whose stock was traded on the New York Stock Exchange in the 1990's. Andersen was its auditor when in November 1998 Sunbeam filed a restatement of its earnings, reducing its earnings for two previous quarters by $60 million, nearly 30 percent of its earnings for that period. Under his supervision, the SEC on May 12, 1998, launched an investigation into Sunbeam's financial statements. He explained the course of the investigation, including Andersen's production of documents under an SEC subpoena and the filing of a complaint in the United States District Court in Florida. The complaint, also admitted into evidence, charged five officers from Sunbeam and the Andersen engagement partner with fraud. An amended complaint was filed on July 11, 2001.[7]

Newkirk then outlined the SEC action taken against Andersen and Waste Management. As he explained it, Waste Management, a Fortune 500 Company whose stock was traded on the New York Stock Exchange, filed a restatement of earnings for the years 1992 through the first three quarters of 1997 of more than $1.7 billion, the largest restatement in history, prompting a formal investigation. There had been an informal investigation, but on the filing of the formal investigation, the SEC promptly issued a

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[7] At this juncture Judge Harmon instructed the jury that these documents were only evidence of the SEC's statements, not the truth of the statements.

subpoena for Andersen documents. Then on June 19, 2001, the SEC filed a complaint in the Federal District Court in Washington, D.C. Andersen consented to a decree enjoining it from future violations of the Securities Laws. The Federal Court also imposed a fine of $7 million against Andersen and fines of from 30 to 50 thousand dollars against three Andersen partners sued in that case. This was the largest fine against a Big Five firm sought and obtained by the SEC. Finally, the government offered through Newkirk the censure of Andersen for issuing false and misleading statements that its audit of Waste Management had been conducted in accordance with generally accepted accounting principles.

Andersen's contention that the evidence of its difficulties with the SEC in the Sunbeam and Waste Management cases was not relevant is not persuasive. The district court carefully examined this question in a written ruling before trial to which she adhered in trial.

The defense of Andersen faced three large realities. First, David Duncan, its partner in charge of the Enron account, pleaded guilty to a criminal charge of obstruction, confessing intent to impede the SEC investigation by shredding documents. Second, it could hardly deny that Andersen engaged in massive shredding and deletion of files as a part of senior management's investigation of its handling of Enron, including difficulties with the accuracy of Enron's financial statement. Third, it must have known that a restatement of earnings of any appreciable size by a Fortunate 500 company would prompt a formal SEC investigation and subpoena for its documents. A contrary contention was a hard sell, at best.

As for Duncan, Andersen's able trial counsel suggested in his cross examination that Duncan was innocent, despite his plea of guilty. The large shredding was said to be an effort to catch up with the cleaning of files that had been put aside, contrary to Andersen's records retention policy and to get the files in order for review by Andersen's Chicago-

based supervisors. It was not to frustrate an SEC investigation.

Under the court's charge, the government had the burden of proving that the shredding was done with the intent to subvert, undermine, or impede an official proceeding, including proceedings before the SEC. In confronting that burden, the government urged that Andersen's difficulty with the SEC in other matters was the backdrop to Andersen's destruction of documents in its internal investigation of its work for Enron. Specifically, the government noted that the trouble at Enron came within months of Andersen being hit in the Waste Management case with the largest fine ever imposed by the SEC upon a Big Five accounting firm, accompanied by censure and a consent to an injunction not to mislead in violation of the securities laws, and that this blow was quickly followed by the filing of an amended complaint in the SEC's Sunbeam suit which leveled charges of fraud against Sunbeam officials and the Andersen partner in charge of that account. This backdrop, with its attendant press, includes the quickly following sudden resignation of Skilling, Enron's CEO, in August 2001. That is, trouble with Enron, Andersen's largest account, came into view less than 90 days from these large developments in Andersen's difficulties with the SEC regarding its work with both Sunbeam and Waste Management.

These "prior" acts were indisputably relevant to the question of Andersen's intent in its destruction of Enron-related documents. This was evidence of Andersen's actual experience with restating earnings and the inevitability of an SEC subpoena. It was evidence that Andersen knew its audit work would be at issue. Moreover, it was a powerful rebuttal of the testimony of Andersen's SEC expert, John Riley, that no SEC subpoena was expected until the end of the first week in November.

Andersen urges that evidence about Sunbeam and Waste Management could not be relevant, absent proof that the facts offered were known by a single person, a corrupt

persuader. It urges that it cannot be charged with the collective knowledge of all its agents. The government replies that the law is to the contrary, pointing to decisions of courts of appeals.[8] We need not resolve that debate. The notes of Nancy Temple, an in-house lawyer, make clear that she was keenly aware of the cease and desist order and the 102(e) censure proceedings in Waste Management, and that she viewed Waste Management and Sunbeam as a "model" for the Enron difficulties. There is much more. On November 6, Lawrence Rieger, a senior partner, sent an email to Temple with press accounts of the press releases by Sunbeam and Waste Management. He included an Andersen memorandum entitled "Action Steps in Response to Indications of Possible Restatement of Financial Statement." That document had been distributed to all U.S. partners. Goolsby, an Andersen partner, and John Riley had extensive knowledge of the proceedings in both Waste Management and Sunbeam and participated in conference calls with Andersen personnel addressing the Enron "crisis." Goolsby had signed the court papers in Waste Management. David Duncan, who had never worked on either Waste Management or Sunbeam matters, knew about those cases. It defies common sense to assert that partners in Andersen would not be informed about both of these cases. At the least, a jury could reasonably so conclude.

Andersen retreats to the contention that in any event there was too much detail about unproved charges, detail that was unnecessary and prejudicial. It points out that its offer to stipulate to the fact of the prior occurrences was not accepted. We are unpersuaded. The government was not required to accept a sterile recitation of the prior events. Rather, it was entitled to leave the clothes on these events, so recent. The district court carefully instructed the jury regarding the limits upon the evidence. Many of the

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8 *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 724 (5th Cir. 1963).

documents were redacted before being sent into the jury room, and counsel had full opportunity to place the events in perspective through cross examination and closing argument. We find no abuse of discretion in the trial judge's weighing of the probative value of the evidence and the risk of collateral prejudice.

3

Andersen next contends that the district court erred in excluding evidence of statements made by Kathy Agnew during an interview with the FBI. According to Andersen, these statements would have enabled Andersen to impeach one of the government's key pieces of evidence suggesting a link between Andersen's decision to destroy documents and its concern over an SEC investigation of Enron.

During the testimony of Agent Sullivan, the agent supervising the FBI's investigation of Andersen, the government introduced notes taken by Agnew of an October 23, 2001, meeting with Andersen partner Thomas Bauer. In these notes, Agnew wrote: "Clean up documentation. SEC voluntary request. Two suits, more on the way." Andersen did not challenge the admission of Agnew's notes, attack Agnew's credibility, or attempt to introduce evidence of other statements made by Agnew while Agent Sullivan was on the stand. Several weeks later, however, the day before closing arguments, Andersen attempted to introduce an FBI report written by Agent Sullivan summarizing statements Agnew made about the October meeting. The report indicates that Agnew did not specifically remember the October 23 meeting, but she recalled that their goal was to ensure that the work papers were complete.

Andersen claims that the statements recorded in Sullivan's report were admissible under Federal Rule of Evidence 806 to impeach the out-of-court statements in her notes. We disagree. Rule 806 allows a party to attack the credibility of a declarant when a hearsay statement or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been

admitted.[9] Rule 806 does not apply in this case, however, because the Agnew notes were not hearsay: the government did not admit them to prove the truth of the statements contained in them. The statements were instead admitted only to show that they were made and that Andersen knew that it was subject to SEC investigation. Because the statements were not hearsay, Rule 806 does not apply.

Indeed, Andersen effectively concedes this point in its reply brief, insisting that the notes were admitted for the truth of the proposition they "implicitly" advanced—that Andersen personnel were instructed to destroy documents because the SEC was conducting an inquiry. That the notes may have suggested a link between Andersen's document destruction and the SEC, however, does not alter the fact that the statements in the notes were not admitted for their truth.

Nonetheless, Andersen urges that Agnew's notes were admitted into evidence only under Rule 801(d)(2)(D) and that Rule 806 should, by its terms, allow for the admission of the FBI report. Andersen's argument is unpersuasive for several reasons. First, despite Andersen's claim, it is not apparent from the record that the district court relied on Rule 801(d)(2)(D) in admitting the notes because Andersen made no objection to their admission and the court did not address the matter directly. Since the notes were readily admissible as non-hearsay statements without regard to Rule 801(d)(2)(D), we will not presume that Rule 801(d)(2)(D) was the sole basis for their admission. Moreover, Andersen appears to assume that Rule 806 applies whenever a statement might have been admitted under Rule 801(d)(2)(D), even if it was in fact admitted on

[9] FED. R. EVID. 806. Rule 806 provides in pertinent part: "When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."

other grounds. We do not read Rule 806 so broadly. As the Advisory Committee notes make clear, the purpose of Rule 806 was to allow for the impeachment of a hearsay declarant.[10] Because the statements in Agnew's notes were not hearsay at all, Rule 806 simply does not apply.

We conclude that the district court did not commit reversible error by refusing to admit the FBI reports of an interview with Agnew.

III

Andersen contends that the jury instructions were flawed in three ways: first in explaining the meaning of "corruptly persuades," then in misstating the element of "official proceeding," and finally in not instructing the jury that the government had to prove that Andersen knew that its destruction of records was unlawful.

"We review the rejection of a requested jury instruction for abuse of discretion, 'affording the trial judge substantial latitude in tailoring [the] instructions.'"[11] Reversal is required only if the requested instruction "1) is substantively correct; 2) was not substantively covered in the charge actually delivered to the jury; and 3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a defense."[12] No error results from a court's refusal to give an instruction that is not substantially correct in its statement of the law.[13]

1

Andersen was convicted of obstructing justice under what has come to be known as the "corrupt persuasion" prong of 18 U.S.C. § 1512(b)(2)(A)&(B). It provides:

[10] *See* FED. R. EVID. 806 advisory committee's notes.

[11] *United States v. Morales*, 272 F.3d 284, 289 (5th Cir. 2001).

[12] *Id.*

[13] *Id.*; *United States v. Dixon*, 185 F.3d 393, 402-03 (5th Cir. 1999).

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to (A) ... withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both.

In this case, the charge read in relevant part:

> To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.

Andersen's principal argument is that the district court's definition of the term "corruptly" in § 1512(b)(2) renders the term superfluous. Andersen argues that, since § 1512(b)(2) explicitly requires that the accused act with the intent to withhold materials from an official proceeding, the term "corruptly" has no meaning under the district court's definition. Andersen urges that "corruptly persuades" requires more than an intent to withhold documents. Andersen contends that the term should be read to require either proof that the person persuaded violated an independent duty or that the person engaged in inherently culpable conduct, such as bribery.

The government challenges Andersen's basic contention that the term "corruptly" would have no independent meaning if defined as "an improper purpose." The government relies on the term's plain meaning, its definition in closely related statutes, the statute's structure, and

legislative history. Specifically, the government notes that courts have routinely defined the term "corruptly" in companion statutes like §§ 1503 and 1505[14] to require "an improper purpose."[15] In *United States v. Reeves*, for example, we defined the term to be an intent to "secur[e] improper benefits or advantages for one's self or for others."[16] The majority of circuits interpreting the term as used in § 1512(b) have reached a similar result, defining "corruptly" in terms of improper purpose despite the dim light it casts upon its meaning, its circularity aside.[17]

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[14] 18 U.S.C. § 1505 criminalizes, in relevant part, anyone who "corruptly ... influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or ... being had by either House, or any committee of either House or any joint committee of the Congress."

[15] *See United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978) (defining "corruptly" as "for an improper purpose" or "an evil or wicked purpose"); *United States v. Partin*, 552 F.2d 621, 641-42 (5th Cir. 1977).

[16] 752 F.2d 995, 1002 (5th Cir. 1985) (interpreting "corruptly endeavor" as related to obstructing the due administration of the tax laws).

[17] *United States v. Shotts*, 145 F.3d 1289, 1300-01 (11th Cir. 1998) ("It is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose. We are unwilling to follow the Third Circuit's lead in imposing a requirement for an additional level of culpability on Section 1512(b) in the absence of any indication that Congress so intended and in the face of persuasive evidence that it did not."); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (finding § 1512(b) not to be unconstitutionally overbroad or vague because "Section 1512(b) does not prohibit all persuasion but only that which is 'corrupt[],'" and "[t]he inclusion of the qualifying term 'corrupt[]' means that the government must prove that the defendant's attempts to persuade were motivated by an improper purpose"); *see also United States v. Khatami*, 280 F.3d 907, 911-12 (9th Cir. 2002) ("Synthesizing these various definitions of 'corrupt' and 'persuade,' we note the statute strongly suggests that one who attempts to 'corruptly persuade' another is, given the pejorative plain meaning of the root adjective 'corrupt,' motivated by an inappropriate or improper purpose to convince another to engage in a course of behavior—such as impeding an ongoing criminal investigation."). *But see United*

We find Andersen's surplusage argument unpersuasive. Andersen's argument relies heavily on the Third Circuit's decision in *United States v. Farrell*.[18] In *Farrell*, a divided panel concluded that the term "corruptly persuades" in § 1512(b) did not proscribe "a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information ... from volunteering information to investigators."[19] In reaching its decision, the court specifically rejected the notion that the term could mean "persuades with the intent to hinder communication to law enforcement," concluding that such a definition "would render the word 'corruptly' meaningless."[20] The panel also dismissed the relevance of court decisions interpreting the term "corruptly" in companion statutes like § 1503.[21] Although these decisions had routinely defined the term to mean "with an improper purpose," the court found these decisions unpersuasive because of the differences between § 1512 and § 1503.[22] Unlike § 1512(b), § 1503 does not include any mens rea element except the term "corruptly." Section 1512(b), by contrast, expressly requires a specific intent to withhold documents from investigators. With this in mind, Andersen

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States v. Farrell, 126 F.3d 484, 490 (3d Cir. 1997) ("[B]ecause the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage, a result that we have been admonished to avoid.").

18 126 F.3d 484 (3d Cir. 1997).

19 *Id.* at 488.

20 *Id.* at 487.

21 18 U.S.C. § 1503(a) provides, in relevant part, that "[w]hoever ... corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b)."

22 *Farrell*, 126 F.3d at 489-90.

asserts that a definition which makes sense in § 1503 becomes surplusage when applied to § 1512(b).[23]

The Third Circuit, however, did not define the term "corruptly" to *require* the violation of an independent legal duty, as Andersen claims.[24] Rather, it held the converse, that encouraging another to exercise a constitutional right is not corrupt.[25] The *Farrell* court specifically declined to define the term in any detail or to give substantive content to the term. Rather, the decision can fairly be read more narrowly: that a person who persuades someone to invoke his Fifth Amendment right does not violate the statute.

Andersen is incorrect, moreover, in its contention that the court's definition of "corruptly" rendered the term superfluous. The court defined "corruptly" to mean "an intent to subvert, undermine or impede the fact-finding ability of an official proceeding." Andersen contends that "corruptly" has no independent meaning under this definition because § 1512(b) already separately requires an intent to impede the fact-finding ability of an official proceeding. Section 1512(b), however, requires an "intent to impair the ... integrity or availability [of an object] for use in an official proceeding"; it does not focus on undermining an agency's fact-finding ability. In short, as defined by the court, "corruptly" was not a mirror of § 1512(b)'s intent requirement.

This point becomes more apparent when the charge is read in full. The district court instructed that "[a]n

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23 *Id.* at 490.

24 *Id.* at 488 ("[W]e are hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause. However, we do not think it necessary to provide such a definition here because we are similarly confident that the 'culpable conduct' that violates § 1512(b)(3)'s 'corruptly persuades' clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.").

25 *Id.* at 488-89.

improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," including "subvert" and "undermine" as urged by Andersen.[26] Acting with an intent to "subvert, undermine, or impede" an investigation narrowed the reach of the statute, insisting upon a degree of culpability beyond an intent to prevent a document from being available at a later proceeding. A routine document retention policy, for example, evidences an intent to prevent a document from being available in any proceeding. But it does not alone evidence an intent to "subvert, undermine, or impede" an official proceeding. In narrowing the statute's potential reach, the district judge rejected the government's argument that the jury should be charged on the bare bones of the statute and shaped the charge to the facts of the case. It also gave meaning to "corruptly persuades." "Subvert" means "to overturn or overthrow from the foundation, ruin" or "to pervert or corrupt by an undermining of morals, allegiance, or faith." The most relevant definition of "undermine" is "to subvert or weaken insidiously or secretly." Impede means "to interfere with or get in the way of," to "hold up." Each of these terms implies a degree of personal culpability beyond a mere intent to make documents unavailable.

The legislative history of § 1512(b), explored by the dissent in *Farrell*, further persuades us that the district court's charge was correct.[27] Section 1512(b) was enacted to replace and expand the witness protection provisions incorporated in *§ 1503*. As initially drafted, § 1512(b) did not bar noncoercive conduct performed with an intent to hide information from investigators; one could violate the statute only through intimidation, use of physical force, threats, or misleading conduct. Congress added the term "corruptly

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[26] The limiting words "for this case" were included at Andersen's urging. The word "impede" was requested by the government and included over the objection of Andersen.

[27] *Farrell*, 126 F.3d at 491-93 (Campbell, J., dissenting).

persuades" in 1988 to "include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." Congress knew that courts had uniformly defined "corruptly" in § 1503 as "motivated by an improper purpose," and it is logical to give the word "corruptly" in § 1512 the same meaning that it has in § 1503. At the very least, this legislative history—and its clear intent to criminalize non-coercive conduct—deflates Andersen's "structural" argument that § 1512 targets certain means used to obstruct justice and not just motive.[28]

We are persuaded that defining "corruptly" as "motivated by an improper purpose" comports easily with the legislative history. Congress intended that § 1512(b) have the same substantive scope as former § 1503. Since § 1503 proscribed conduct undertaken "with an improper purpose," § 1512(b) should also do so.

Andersen requested that the jury be instructed that the only way corrupt persuasion may be found is by an improper method or a violation of an independent legal duty. We find no court that has come to this conclusion. Andersen bases its argument on *Farrell*, but Andersen's description of the holding is an incomplete statement of the Third Circuit's viewpoint. *Farrell* made clear that a violation of an independent legal duty is sufficient to prove corrupt persuasion, and it refused to define "corruptly persuade" as acting with an improper purpose, but it did not hold that violating an independent legal duty or persuading by an

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[28] Andersen argued that the structure of the statute required the definition of "corruptly persuades" to be based on the means of persuasion used rather than the persuader's motive or intent. It points out that, before the statute was amended to include "corrupt persuasion," the statute criminalized only certain behaviors—namely, the use of intimidation or physical force, threats, and misleading conduct. Andersen argued that it would be anomalous to construe the term "corruptly persuades" differently; it must also be interpreted to require similarly culpable actions.

improper method was the only way to establish a § 1512(b) violation.[29] The statute itself has no such requirement.

Andersen, moreover, gives no explanation why "improper purpose" should require unlawful conduct. Under the caselaw, "corruptly" requires an improper *purpose*, not improper *means*,[30] and Andersen offers no explanation why "improper *purpose*" should require "improper means." Indeed, the means used would seem to be relevant only to the extent that they shed light on whether the purpose was improper. Moreover, the only examples of "unlawful conduct" that Andersen gives are bribery and counseling a witness to lie. The statute would have little independent reach, however, if it could be violated only through bribery or suborning perjury because such conduct is to a large extent criminalized in other provisions of the criminal code.[31] Yet Andersen offers no other examples of "culpable" or "unlawful" conduct sufficient, under its test, to trigger the statute. We cannot lightly conclude that Congress intended for the statute to do only work already done by the criminal code.

Finally, even ignoring Andersen's failure to request a substantially correct instruction, the submitted instruction survives harmless error review. Trial error is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict," or leaves us in "grave doubt" as to whether it such an effect. On the facts of this

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[29] *Farrell*, 126 F.3d at 488-90 (explaining that it was "hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause," and finding it unnecessary to do so because the conduct at issue—"a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators"—could not satisfy the statute).

[30] *See, e.g.*, *U.S. v. Khatami*, 280 F.3d 907, 911-12 (9th Cir. 2002); *U.S. v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452-53 (2d Cir. 1996).

[31] 18 U.S.C. § 1622, for example, criminalizes subornation of perjury.

case, that the jury was not required to find a violation of an independent legal duty did not have a substantial and injurious effect on the verdict. The jury was instructed that to corruptly persuade another, Andersen must have acted with an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding. Contrary to Andersen's assertions, this instruction does not read "corruptly persuade" out of the statute. Acting with an intent to withhold a record from an official proceeding casts a wider net than acting with an intent to subvert, undermine, or impede the entire fact-finding ability of the proceeding. There is nothing improper about following a document retention policy when there is no threat of an official investigation, even though one purpose of such a policy may be to withhold documents from unknown, future litigation. A company's sudden instruction to institute or energize a lazy document retention policy when it sees the investigators around the corner, on the other hand, is more easily viewed as improper. The instruction's requirement of an improper purpose in withholding the documents ensures that the jury found a level of culpability over and above the mere intent to withhold a document from an official proceeding. We cannot say that the error had a substantial and injurious effect on the jury's verdict.

The court narrowed the reach of the statute at the urging of Andersen. Any error that occurred did not have a substantial and injurious effect on the jury's verdict.

2

Andersen argues that the jury instructions were also flawed in their explanation of an "official proceeding."[32] The

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[32] The jury charge instructed:

> An "official proceeding" is a proceeding before a federal court, judge, or agency. In this regard, you are instructed that the Securities and Exchange Commission, otherwise known as the "SEC," is a federal agency, and that an "official proceeding," for this case, is a proceeding before a federal agency, such as the SEC. A proceeding before a

contention is that while § 1512(b)(2) provides that the proceeding "need not be pending or about to be instituted at the time of the offense,"[33] it does not offer guidance as to the concreteness of the defendant's expectation of a proceeding.

Andersen first contends that it was entitled to have the jury instructed that an "official proceeding" had to be "ongoing or ... scheduled to be commenced in the future." Resting on this court's decision in *United States v. Shively*,[34] the argument is that there must be proof of "intent to affect ... some particular federal proceeding that is ongoing or is scheduled to be commenced in the future."[35] The government argues, and we agree, that this statement was dicta, it having already concluded that the government failed to prove that the defendant intended to affect an official proceeding. This reconciles *Shively* with the plain language of the statute, an accommodation that we should prefer over a reading that defies the statutory provision that an official proceeding "need not be pending or about to be instituted at the time of the offense."

Andersen next maintains that it was entitled to an instruction to the jury that it could not be found guilty unless at the time of the obstructing act it "had in mind a particular proceeding that it sought to obstruct." In addition to its reliance upon *Shively*, Andersen argues that

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federal agency includes all of the steps and stages in the agency's performance of its governmental functions, and it extends to administrative as well as investigative functions, both formal and informal. For purposes of this case a civil law suit brought by private litigants is not an official proceeding.

The charge goes on to explain that "the government need prove only that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served."

[33] 18 U.S.C. § 1512(e)(1).

[34] 927 F.2d 804, 812-13 (5th Cir. 1991).

[35] *Id.*

Congress could not have intended to criminalize the widespread use of records retention programs, all of which have a general purpose of not retaining documents that might be helpful to some later appearing adversary—that this court should read the statute to insist upon proof that a defendant intended to impede a particular proceeding. The argument anticipates a government argument that this is fanciful, pointing out that the prosecution argued just that in ascribing criminal intent to Michael Odom's statement in a videotaped meeting with employees that the records retention policy should be followed because it would make records unavailable in possible future litigation—even though it asserts his remarks were unrelated to Enron. Indeed, it argues, the jury asked to see the video during its deliberations. This, it urges, makes clear that the jury was allowed to convict for acts that do not violate the statute.

This contention is not without force, but it fails here. Andersen's requested instruction is in tension with the congressionally detailed reach of the statute. It ignores the statutory language, which does not require a defendant to know that the proceeding is pending or about to be initiated.[36] Its stronger argument is that without insisting that a defendant's intent to impede a proceeding have some limiting sights, companies could be convicted for maintaining records retention programs which were adopted with no proceeding in mind. The answer here may lie with the sound application of the elements of corrupt purpose and intent. That case is not before us.

Ultimately, we find no reversible error. Wherever the permissible reach of this statute may be finally drawn, it is beyond this case. This case was tried on the theory that Andersen intended to undermine, subvert, or impede a proceeding of the SEC. The government did not suggest that a records retention program violated the Act. Rather, it argued that Andersen used that policy as a code to

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[36] *See* 18 U.S.C. § 1512(b), (f).

shred—to subvert, undermine, or impede a government proceeding it knew was imminent. There was no risk of conviction for innocent maintenance of a records program. That the SEC was the feared opponent and initiator of a proceeding and not some other shadowy opponent was clear at every step. That is how the case was tried and the jury charged. Prosecutor Matthew Freidrich in the first opening statement of the government told the jury:

> They knew that the SEC was coming ... they knew what that could mean to the firm ... and the reason that they knew that was because Andersen—at the time these events that are set out in the indictment happened, Andersen was already under a form of probation with the SEC ... if Andersen was found to, again, have violated securities laws, they could have their ticket pulled, meaning they could be debarred. They could be stopped from practicing accounting in front of the SEC, and that would have meant the end of the practice. ... [T]his case is all about a group of partners at Andersen who knew that the law was coming and did what they could ... to hinder the law. And at the end of the trial, we will ask you to find them guilty of that.

This case, as charged[37] and tried, was well within the statute. We cannot find reversible error in the trial court's rejection of Andersen's request to add to the definition of an official proceeding that it be a particular proceeding.

3

Finally, Andersen argues that the district court erroneously charged the jury by not instructing that "a

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[37] The indictment alleged, "In the summer and fall of 2001, a series of significant developments led to ANDERSEN's foreseeing imminent civil litigation against, and government investigation of, Enron and ANDERSEN." The jury was instructed in the court's final charge that "for purposes of this case a civil law suit brought by private litigants is not an official proceeding."

conviction under section 1512(b)(2) is permissible only if the defendant is shown to have known that its conduct was wrongful." It asserts that because persuading another to withhold documents from an official proceeding is not necessarily culpable conduct, Congress must have intended "corruptly" to shield those who act without knowledge of their unlawful conduct from culpability.

The government responds, and we agree, that the jury was properly instructed because knowledge of one's violation is not an element of § 1512(b)(2). The general rule, of course, is that ignorance of the law is no defense.[38] When Congress wishes to avoid the general rule, it usually does so by requiring that a defendant act willfully or with specific intent to violate the law.[39] Section 1512(b)(2) does not require that the defendant act willfully, and does not provide that a defendant may be convicted only if the defendant knows his conduct is unlawful. Andersen's argument misses the import of the jury's finding that it acted with an improper purpose; one could act with an improper purpose even if one did not know that the actions were unlawful. The instructions required the jury to find the appropriate mental states for a § 1512(b)(2) violation: the jury could convict Andersen only if it found that Andersen intended to subvert, undermine, or impede the fact-finding ability of an official proceeding. The district court did not err by refusing to give an "ignorance of the law" instruction.

IV

Andersen challenges two additional rulings of the district court involving the cross-examination of David Duncan and remarks made by the prosecutor in his closing argument. We find no reversible error.

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[38] *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994).

[39] *Id.* at 143-46; *Cheek v. United States*, 498 U.S. 192, 199-200 (1991).

Inappropriate and harmful comments made during closing argument may constitute reversible error.[40] When reviewing alleged improper comments, we first determine whether the comments were improper and then decide whether they caused harm.[41] "Improper argument harms the defendant if it affects his substantial rights."[42] Finally, "it is necessary to look at [the challenged remarks] in context."[43]

The comments at issue here involve an email written by Rodney Faldyn demonstrating Andersen's adoption of a previously rejected accounting practice that allowed Enron to avoid a restatement of earnings. At least one copy of the email was deleted during the document destruction, but copies of the email survived. During its opening statement, the prosecution said, "you won't find another copy of this [email] anywhere in evidence. Do you think the SEC would have wanted to see this document?" At a bench conference, Andersen informed the court that a copy of the email was in fact produced to the SEC. The prosecution told the court that it would not have made the statement if it knew that a copy was produced, and the court found that the prosecution acted in good faith. To cure any confusion, the district court instructed the jury that despite the government's good faith belief, "an undeleted copy of the document exists and [] it was produced to the SEC pursuant to the subpoena. ... [Y]ou are not to consider any arguments regarding whether or not another copy of that document was preserved."

During rebuttal summation, the government again referred to the Faldyn email as evidence of Andersen's change of accounting practice in relation to Enron. In response to Andersen's argument that it destroyed only

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40 *United States v. Simpson*, 901 F.2d 1223, 1227 (5th Cir. 1990).

41 *United States v. Gallardo-Trapero*, 185 F.3d 307, 320 (5th Cir. 1999).

42 *Simpson*, 901 F.2d at 1227.

43 *Gallardo-Trapero*, 185 F.3d at 320.

unimportant documents, the government noted that the Faldyn email was deleted and said, "ask yourselves, the SEC, would you want this?" Andersen objected, asserting that the prosecutor's argument ignored the court's previous instruction to the jury that the SEC received a copy of the email. The court overruled the objection, and the prosecutor went on to explain to the jury that even if copies of the email survived and were produced, one deletion alone was significant. That some Andersen employees "didn't get the message" to destroy documents, the argument goes, does not indicate that Andersen was not attempting to destroy important documents. The government argued further that the destruction of a copy of an important document is significant because a copy could indicate who had the document, when the person received it, and whether the person destroyed it.

Andersen moved for a mistrial after closing arguments, and the court denied the motion. The court disagreed with Andersen's contention that the prosecution simply repeated its confusing remarks from opening statements, noting that the prosecutor indicated that there were other copies of the email and "never said this was the only document"; rather, the prosecutor asked, "wouldn't the SEC have liked to have seen that."

Andersen asserts that the rebuttal comments "created the incorrect impression that Andersen had deleted all copies of the email." Andersen views the rebuttal comments as misleading and misstating the evidence, and contends that because the discussion of the Faldyn email was a significant portion of the government's rebuttal, a new trial is warranted.

We find no prosecutorial misconduct here. The comments made during rebuttal were different from the remarks made during opening statement. The opening statement remark that no copy of the email would be found in evidence could have confused the jury by implying that all copies of the email were destroyed. In contrast, the rebuttal comments highlighted the email's importance, asserted that

the SEC would want to see it, and noted that at least one copy of it was deleted. The prosecutor did not claim that all copies of the email were destroyed or that no copy of the email was received by the SEC; rather, the prosecutor argued that destruction of one copy alone demonstrates the document's incriminating nature and Andersen's intent to keep it from the SEC, even if other copies eventually were produced. The court did not err in finding that these comments were not improper and denying Andersen's request for a mistrial.

2

Andersen asserts that the district court "prejudicially handicapped [its case] by undermining the cross-examination of David Duncan." It claims that the basis of its cross-examination of Duncan was four summaries of interview sessions ("FD-302 forms") between Duncan and the FBI drafted by FBI agents after the interviews. During his cross-examination, Duncan said that the four FD-302s forms contained various inaccuracies and misstatements. The court sustained the government's objection to Andersen's attempt to cross-examine Duncan regarding the discrepancies between his recollection and the summaries. Andersen requested an evidentiary hearing to determine the nature of the inaccuracies, and the government explained that Duncan marked his own copies of the summaries, highlighting portions he felt were inaccurate. The court conducted an *in camera* review of three of Duncan's copies of the summaries, finding that none of the inconsistencies were material. Rather, the court found that Duncan's notations referred to specific words or phrases, making it "more likely that Duncan, a precise accountant, meant by his highlighting that the agent failed to capture in his prose the precise flavor of what Duncan recalled as his actual statement." The court accordingly denied Andersen's motion for an evidentiary hearing.

Based on these events, Andersen presents two claims of error: (1) the district court exerted insufficient effort to

determine the materiality of misstatements in the FD-302 forms, and (2) the court's failure to provide the marked FD-302 forms crippled Andersen's ability to effectively cross-examine David Duncan.

Andersen provides no authority to justify reversal of the jury's verdict, and we find none. To the contrary, Andersen's various assertions are belied by the underlying events. First, the facts demonstrate that Andersen had everything it needed to effectively cross examine Duncan. Duncan's cross-examination lasted three days and covered a wide range of topics. Andersen could have questioned Duncan about his statements to the FBI and then compared his statements to the summaries drafted by the FBI agent. Andersen then could have highlighted to the jury any inconsistencies between his testimony and the summaries, and could have called the FBI agent who drafted the summary to explore the discrepancies. Andersen did not take these opportunities below, perhaps because impeaching Duncan's credibility would undermine its admitted strategy of using Duncan's testimony to support its own defense.

Second, Andersen did not present to the court below one of its primary complaints—that the court could not adequately determine the materiality of the inconsistencies because the court reviewed only three of the four summaries marked by Duncan. Andersen did not complain to the district court that the court's review was insufficient by failing to review the fourth summary. Furthermore, it was Duncan's attorney, not the government, who possessed and provided the marked summaries, but Andersen did not inquire as to why the fourth summary was not provided.

Given that Andersen provides no authority explaining why the court's actions and findings require reversal, and that the facts undermine its assertion that it could not effectively cross-examine Duncan, we find no reversible error.

V

For these reasons, we AFFIRM the judgment of conviction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[CLERK, U.S. DISTRICT COURT]
[SOUTHERN DISTRICT OF TEXAS]
[ENTERED]
[5/24/02]
[MICHAEL N. MILBY, CLERK]

UNITED STATES OF AMERICA,	}	
Plaintiff	}	
v.	}	CRIMINAL ACTION NO. H-02-121
ARTHUR ANDERSEN LLP,	}	
Defendant.	}	

MEMORANDUM OPINION

On April 29, 2002 the government filed an In Limine Memorandum of Law Regarding Evidentiary Issues and Jury Instructions. (Document No. 37). On May 3, Andersen filed its response to the Government's memorandum. (Document No. 56). In the memorandum and response, the parties briefed their positions on various points of law including: (1) the admissibility of evidence relating to SEC regulatory actions and sanctions arising out of Andersen's audit work for Waste Management and Sunbeam; (2) the definition of "corruptly" as used in Title 18 U.S.C. § 1512(b); (3) whether a defendant must have knowledge that his conduct is illegal to be convicted under § 1512(b); and (4) whether a preliminary inquiry by the SEC qualifies as an "official proceeding" under § 1512(b)(2)(B) and if the inquiry must be ongoing or scheduled at the time the alleged offense

occurred. After carefully reviewing the parties' briefs on the issues and the relevant law, the Court concludes that (1) evidence relating to Andersen's audit work for Waste Management and Sunbeam is admissible; (2) the word "corruptly" as used in § 1512(b) is properly defined as acting "with an improper purpose"; (3) a defendant need not know that his conduct is illegal to be convicted under § 1512(b); and (4) a preliminary inquiry by the SEC is an official proceeding and that the proceeding need not be ongoing or scheduled at the time the alleged offense occurred.

* * *

II. Meaning of "corrupt persuasion"

Title 18 U.S.C. Section 1512(b) states, in relevant part:

> [w]hoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... (2) cause or induce any person to ... (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined ... or imprisoned ... or both."

(emphasis added). According to the government, a defendant "corruptly persuades" when he, with "an improper purpose," attempts "to induce another person to engage in certain conduct." (Gov't's Proposed Revised Jury Instr., p. 31). Applying this definition, the government's proposed jury instructions state:

> Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of the Andersen firm acting within the scope of his or her employment induced or attempted to induce a firm employee or partner or some other person to engage in certain conduct and that the agent did so with the intent to obstruct an official proceeding, then you may find

> that the Andersen firm committed the first element of the charged offense.

(Id. at p. 32).

Andersen contends, however, that "corruptly" must be defined more narrowly than "improper purpose." Specifically, Andersen argues that a defendant acts corruptly where he "(1) uses an improper method, such as bribery or other unlawful means, to induce that person to act; or (2) persuades the other person to do something that they would not have had a lawful right to do had they been acting on their own." (Def.'s Proposed Jury Intr., p. 7)

The Fifth Circuit has not defined the word "corruptly" as used in § 1512(b)(2). However, in § 1512's predecessor statute, 18 U.S.C. § 1503, the Court defined acting "corruptly" to mean to act "with improper motive or with bad or evil or wicked purpose." *United States v. Partin*, 552 F.2d 621, 641-42 (5th Cir. 1977) (quoting *United States v. Ryan*, 455 F2d 728, 734 (9th Cir. 1972) (holding that "The word 'corrupt' in the statute means for an evil or wicked purpose."); *see United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978) (holding that "The term 'corruptly' means for an improper motive) (citing *Martin v. United States*, 166 F.2d 76, 79 (4th Cir. 1948)). The Fifth Circuit pattern jury instructions state that a defendant acts "'corruptly,' that is, knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of the court proceeding in which the juror served." § 2.67 (2001). Furthermore, in another statute dealing with obstruction of the administration of internal revenue laws, 26 U.S.C. § 7212(a), the Fifth Circuit defined "corruptly" as an intent to "secur[e] improper benefits or advantages for one's self or for others." *United States v. Reeves*, 752 F.2d 995, 1002 (5th Cir. 1985).

The legislative history of § 1512 suggests that the Fifth Circuits's interpretation of "corrupt" in § 1503 should be applied to § 1512 as well. Section 1512 was enacted in 1982 to replace and expand the witness protection provisions of

§ 1503. However, when § 1512 was originally enacted, Congress neglected to include the phrase "corruptly persuades." In *United States v. King*, the Second Circuit found the omission significant. The Court held that while § 1503 had been interpreted to extend to non-coercive conduct through the "corruptly endeavors" clause, Congress must not have intended to penalize such conduct in § 1512 because the "corruptly" phrase had been omitted. Accordingly, the court concluded that Congress did not intend to penalize a "nonmisleading, nonthreatening, nonintimidating attempt to have a person give false information to the government ..." 762 F.2d 232, 238 (2nd Cir. 1985). The Second Circuit noted that if Congress wished to penalize non-coercive conduct in § 1512, it would have to amend the statute. In 1988 Congress, referring to the *King* case, amended § 1512 to prohibit "corruptly persuading." Therefore, the legislative history of § 1512 suggests that in amending the statute to include the phrase "corruptly persuades" Congress intended to prohibit non-coercive activity covered by the "corruptly" phrase in § 1503. Because the Fifth Circuit interpreted "corruptly" in § 1503 as "with an improper motive" or wicked purpose, the same meaning must be applied to "corruptly" in § 1512.

Moreover, the case law supports the improper purpose interpretation of § 1512. In *United States v. Khatami*, a woman under investigation by the Social Security Administration told potential witnesses "not to tell [investigators] anything." 280 F.3d 907, 909 (9th Cir. 2002). In upholding Khatami's conviction under § 1512(b), the Ninth Circuit concluded that the plain meaning of "corruptly" was to be "motivated by an inappropriate or improper purpose ..." *Id.* at 911. In *United States v. Shotts*, the defendant was convicted under § 1512(b) for telling his secretary to "not say anything" to the FBI. In defining "corruptly persuade," the Eleventh Circuit held that "It is reasonable to attribute to the "corruptly persuade" language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable

language in Section 1503(a), i.e., motivated by an improper purpose." 154 F.3d 1289, 1301 (11th Cir. 1998). Similarly, in *United States v. Thompson*, the Second Circuit stated that the term "corrupt" "means that the government must prove that the defendant's attempts to persuade were motivated by an improper purpose."

Andersen, relies primarily on two cases in support its narrower interpretation of § 1512(b). In *United States v. Farrell*, a criminal defendant attempted to persuade a co-conspirator not to reveal information about their conspiracy to federal investigators. 126 F.3d 484 (3d Cir. 1997). The Third Circuit held that the defendant could not be convicted under § 1512(b), because the it is not "corrupt" to convince someone to exercise a constitutional right to remain silent. *Id.* at 488. In reaching its conclusion, the court rejected the government's proposal that corruptly be defined as "improper purpose." *Id.* at 490. The court reasoned that the statute appears to define what the improper purposes are: persuading someone to withhold testimony, destroy documents, be absent from official proceedings, and the like. Because the statute includes specific improper purposes, defining "corruptly" as "with an improper purpose" renders the term mere surplusage, a result to be avoided. Therefore, the court concluded that the term must be read to include some form of conduct more culpable than "improper purpose." In *United States v. Davis*, the Third Circuit upheld a defendant's conviction for corruptly persuading under § 1512(b), but appeared to confirm the court's more restrictive reading of corruptly persuades in *Farrell* defining "corrupt" as an attempt to influence another to violate a legal duty. 189 F.3d 231, 248 (3d Cir. 1999).

However, the Third Circuit precedent relied on by Andersen is less than clear on what meaning should be attributed to "corruptly." First, in a more recent case, the Third Circuit appears to have retreated from its narrow definition of the phrase. In *United States v. Applewhaite*, the defendant's husband was assaulted by her boyfriend

outside her home. 195 F.3d 679 (3d Cir. 1999). In an effort to cover up evidence of the assault, the defendant hired a worker to paint a wall and dig up a flowerbed where blood had been splattered. After a jury trial, the woman was convicted under § 1512(b) for corruptly persuading another to destroy evidence. On appeal, the defendant argued that the evidence at trial was insufficient to establish that she persuaded someone to destroy evidence. *Id.* at 687. The Third Circuit disagreed, stating that evidence that the wall had never been painted before, that it was painted the morning after the crime, and that forensic evidence revealed the husband's blood on the wall and in the soil was enough to show that the wall was painted to cover up evidence. *Id* at 688 Furthermore, testimony by the defendant's neighbors that she was seen painting the wall with a young man on the morning after the crime was enough to show that she had persuaded another to help her destroy the evidence of the assault. *Id.*

In reaching its holding the *Applewhaite* Court did not cite Farrell or Davis. Indeed, the result in *Applewhaite* appears inconsistent with the Court's prior holdings. Painting a wall or digging up a flowerbed is, by itself, completely benign. Similarly, hiring a worker to paint or dig does not suggest culpable conduct. Her action was culpable only because her purpose was to cover up evidence of a crime. In other words, her purpose in persuading the worker to help her paint and dig was improper. This holding directly contradicts the Court's earlier definition of "corruptly" in *Davis*. In *Davis* the Court defined corruptly persuade as the act of persuading another to violate a legal duty.

The evidence in *Applewhaite* did not suggest that the defendant persuaded the worker to violate a legal duty. She simply hired the worker to paint and dig, neither of which is illegal. *Applewhaite* suggests, therefore, that the Third Circuit has moved towards the broader interpretation of "corruptly" embraced by the majority of other circuits.

Andersen further argues that "corruptly" should not be defined as "improper purpose" because it renders the term surplusage. This assertion, however, is not correct. The dissenting judge in *Farrell* explained that a mother urging her son to invoke his Fifth Amendment right to remain silent is technically urging her son to "withhold testimony," which is prohibited by § 1512(b). However, urging one's child to exercise a constitutional right is not an act that Congress likely sought to criminalize. If "corruptly" is defined as "with an improper purpose" the mother's action is not criminalized by § 1512(b), her purpose was not improper. Consequently, when defined as "improper purpose," the word "corruptly" is not superfluous.

Consequently, the Court concludes that "corrupt" is properly defined as acting "with an improper purpose." The Fifth Circuit adopted this definition in § 1512's predecessor statute. The majority of circuits to address the question adopted the improper purpose definition. Furthermore, while the Third Circuit initially embraced a more narrow definition of the term, the *Applewhaite* case suggests that the court is moving towards the improper purpose standard. In fact, the facts of the *Applewhaite* case are strikingly similar to the alleged wrongdoings by Andersen. The defendant in Andersen persuaded someone under her employ to perform an action which, by itself, was benign, but resulted in the destruction of evidence. In the present case, the indictment alleges that partners or agents of Andersen persuaded others to shred documents (which is not itself culpable conduct) with the intention of keeping the information from the SEC.

III. Knowledge of the wrongfulness of actor's conduct

Andersen argues that "[a]t the very least, [it] is entitled to an instruction making it clear that persuasion is not 'corrupt' unless the actor knows that his conduct is unlawful." (Def.'s Resp. to Gov't's In Limine Mem., p. 19). In other words, Andersen asserts that if the defendant does not understand that his conduct violates the law, the defendant did not possess the state of mind required for

conviction under § 1512(b). In support of its contention, Andersen cites *United States v. Frankhauser*, in which the defendant persuaded a coconspirator's mother to clear out her son's room before the F.B.I. obtained a warrant to search it. 80 F.3d 641 (1st Cir. 1996). In upholding the defendant's conviction under § 1512(b), the First Circuit noted that the evidence indicated that Frankhauser had the necessary *mens rea* under § 1512(b) because there was evidence that he had previously been convicted for participating in a conspiracy to obstruct justice by advising the destruction of documents. *Id.* at 652. The defendant's specific knowledge that advising another to destroy documents violated the law, the Court noted, "gave him notice that his advice to [his coconspirator's mother] was illegal, thus establishing that he acted with corrupt intent to violate the law." *Id.* Based on *Franhauser*, Andersen argues that a conviction under § 1512(b) requires knowledge that one's conduct violates the law.

The Court, however, concludes that Andersen's interpretation of *Frankhauser* is incorrect. In *Frankhauser*, the Court did not hold that a defendant *must* know that his conduct is illegal under § 1512(b). The Court stated that the First Circuit had yet to "decide what state of mind a defendant must have with respect to an official proceeding in order to violate section 1512 ..." *Id.* Instead of defining the requisite *mens rea*, the Court concluded that because the defendant had specific experience of the law he violated, he clearly had the requisite *mens rea*, whatever it is. In other words, the Court did not hold that knowledge is a necessary condition, only that it is sufficient.

In fact, the case law clearly demonstrates that specific knowledge of the law is not required under § 1512(b). In *United States v. Mullen*, the defendant requested that the district court instruct the jury that to be convicted under § 1512 there must be proof that the defendant "knowingly did an act which the law forbids ..., purposely intending to violate the law." 22 F.3d 1365, 1369 (6th Cir. 1994). The court refused, however, concluding that specific knowledge

that one's conduct violates the law is not required under § 1512. The court instructed the jury that the government must prove that "the defendant ... corruptly endeavored to influence, obstruct, or impede the due administration of justice ... with the intent of purpose of obstruct. [*sic*]" *Id.* On appeal, the Sixth Circuit held that the district court's instructions "accurately and succinctly convey the mental states necessary for conviction under 18 U.S.C. §§ 1503, 1512. Furthermore, convictions under § 1512(b) are routinely upheld despite the fact that the defendant was unaware of § 1512(b) at the time the offense was committed. *See Khatami*, 280 F.3d at 912; *Applewhaite*, 195 F.3d at 688; *Davis*, 183 F.3d at 250; *Shotts*, 145 F.3d at 1299-1303. Accordingly, the Court concludes that a defendant need not be aware that his conduct is illegal to be convicted under § 1512(b).

IV. Meaning of "Official Proceeding" under § 1512(b)

In its proposed jury instructions the parties dispute the meaning of "official proceeding" under § 1512(b) with respect to the actions of the SEC. First, Andersen contends that a preliminary inquiry by the SEC does not constitute an official proceeding. Second, Andersen's instructions that an "official proceeding must be one that is ongoing or has been scheduled to be commenced in the future." (Def.'s Proposed Jury Instr., p. 5). The government disputes both assertions.

Preliminary Inquiry by SEC. As used in § 1512, an "official proceeding" is "a proceeding before a Federal Government agency which is authorized by law ..." 18 U.S.C. § 1515(a)(C). The SEC is clearly an agency which is authorized by law. The question is whether an "inquiry" qualifies as a "proceeding." The case law states that a "proceeding" is not restricted to formal adjudicative process. *Rice v. United States*, 356 F.2d 709, 713 (8th Cir. 1966). Rather, an agency's investigative process also qualifies as a "proceeding." *Id.*; *see also United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984) ("Agency investigative activities are 'proceedings' within the meaning

of § 1505[, predecessor of § 1512]"). "[I]t would be absurd to hold that Congress meant to proscribe interference with the administrative process only after [an agency] proceeding had reached a certain formal stage and let go unpunished individuals who obstruct earlier preliminary proceedings." *Rice*, 356 F.2d at 712. Moreover, while some court's have held that police investigations by the FBI and U.S. Attorney's Office are not "official proceedings" the Seventh Circuit recently held that an investigation by the SEC is a proceeding distinct from a police investigation. *United States v. Senffner*, 280 F.3d 755, 761 (7th Cir. 2002). Moreover, in *Senffner* the court noted that an SEC investigation is a proceeding even when it is being conducted outside the authority to issue subpoenas and administer oaths. *Id.* Accordingly, the Court concludes that a preliminary investigation by the SEC is an official proceeding under § 1512(b)(2).

Ongoing or Scheduled. Relying on *United States v. Shively*, Andersen argues that § 1512(b) is not violated unless the "official proceeding" is ongoing or scheduled at the time the document destruction occurred. 927 F.2d 804 (5th Cir. 1991). *Shively*, however, does not support Andersen's argument. In *Shively*, the defendant threatened a potential state civil court witness. Two and a half years later, Shively was indicted and convicted for the threat under § 1512(b) for obstructing a proceeding before a federal grand jury. The Fifth Circuit reversed the conviction, holding that "[w]ithout at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future, this statute does not proscribe his conduct." *Id.* at 812-13. The reasoning behind the Fifth Circuit's ruling in *Shively* was that at the time the threat was made, the grand jury proceedings, which he was alleged to have been obstructing, were over two years away. Without even the remote connection between the obstruction and the proceeding, the conviction could not be sustained. Subsequent courts have held, however, that *Shively* does

not stand for the proposition that the proceeding *must* be ongoing or scheduled, only that it not be too remote to connect the obstruction to the proceeding. In *Frankhauser*, the court noted that "[w]e do not adopt the Shively opinion insofar as it may indicate that a defendant in every case must actually know that an official proceeding has been commenced or scheduled ... Each case must be evaluated on its own facts." 80 F.3d at 652. In *United States v. Kelley*, the court cited *Shively* in holding that § 1512 is violated if the defendant "fear[ed] that a grand jury proceeding had been or might be instituted." 36 F.3d 1118, 1128 (D.C. Cir. 1994).

Accordingly, the Court holds that a preliminary inquiry by the SEC constitutes an official proceeding under § 1512(b)(2)(B). Furthermore, convictions under § 1512(b) do not require that the proceeding be ongoing or scheduled.

SIGNED at Houston, Texas, this 24th day of May, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	June 5, 2002
Defendant	:	9:19 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

* * *

THE COURT: * * *

Specific instructions. The indictment charges in relevant part, quote, on or about and between October 10, 2001, and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago; Illinois; Portland, Oregon; and London, England, Andersen, through its partners and others, did knowingly, intentionally, and corruptly persuade and attempt to persuade other persons, to wit, Andersen employees with intent to cause and induce such persons to, A, withhold records, documents, and other objects from official proceedings; namely, regulatory and criminal proceedings and investigations and, B, alter, destroy, mutilate, and conceal objects with intent to impair the object's integrity and availability for use in such official proceedings.

Title 18, United States Code, Sections 1512(b)(2) and 3551 and following. Title 18, United States Code, Section 1512(b) provides that—I'm sorry. I should have said close quote.

Now, starting again, Title 18, United States Code, Section 1512(b) provides that, quote, whoever knowingly and corruptly persuades another person, or attempts to do so, with intent to cause or induce any person to withhold a record, document, or other object from an official proceeding or alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding shall be guilty of a crime, close quote.

In order to prove Andersen's guilt—I'm sorry. In order to prove Andersen guilty of violating this provision, the Government must prove each of the following two elements beyond a reasonable doubt:

First, that on or about the dates charged, the Andersen firm through its agents corruptly persuaded or attempted to corruptly persuade another person or persons; and second, that Andersen through its agents acted knowingly or with intent to cause or induce another person or persons to, A, withhold a record or document from an official proceeding or, B, alter, destroy, mutilate, or conceal an object with intent to impair the object's availability for use in an official proceeding.

A, quote, official proceeding, close quote, is a proceeding before a federal court, judge, or agency. In this regard, you are instructed that the Securities and Exchange Commission, otherwise known as the SEC, is a federal agency, and that a, quote, official proceeding for this case is a proceeding before a federal agency such as the SEC.

A proceeding before a federal agency includes all of the steps and stages in the agency's performance of its governmental functions and it extends to administrative as well as investigative functions, both formal and informal. For purposes of this case, a civil lawsuit brought by private litigants is not an official proceeding.

For the first element, to determine whether Andersen corruptly persuaded, quote, another person, close quote, an employee or partner of Andersen is considered, quote, another person, close quote. To, quote, persuade, close

quote, is to engage in any non-coercive attempt to induce another person to engage in certain conduct.

The word, quote, corruptly, close quote, means having an improper purpose. An improper purpose for this case is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.

In order to establish this corrupt persuasion element, the Government must prove that the agent of Andersen who engaged in the persuasion, not the other person persuaded, possessed the improper purpose. The improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose.

Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of Andersen acting within the scope of his or her employment induced or attempted to induce another employee or partner of the firm or some other person to withhold, alter, destroy, mutilate, or conceal an object and that the agent did so with the intent, at least in part, to subvert, undermine, or impede the fact-finding ability of an official proceeding, then you may find that Andersen committed the first element of the charged offense.

The second element of the charged offense—obstruction offense is that Andersen, through its agents, acted knowingly and with the intent to cause or induce another person to withhold a record or a document from an official proceeding or to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding.

An act is done with the intent to impair the integrity or availability of a document or object only if it is undertaken with the specific purpose of making the document or object unavailable for use in an official proceeding.

However, the Government is not required to prove that Andersen's sole or even primary intent was to cause another person to make a document or object unavailable for use in an official proceeding. You may find that this intent element

has been established if you conclude that Andersen acted, at least in part, with the intent to cause another person to make a document or object unavailable for use in an official proceeding.

In order to establish that Andersen committed the charged offense, it is not necessary for the Government to prove that an official proceeding was pending or even about to be initiated at the time the obstructive conduct occurred. Nor is it necessary for the Government to prove that a subpoena had been served on Andersen or any other party at the time of the offense.

The Government need only prove that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served.

Furthermore, it is not necessary for the Government to prove that Andersen knew that its conduct violated the criminal law. Thus, even if Andersen honestly and sincerely believed that its conduct was lawful, you may find Andersen guilty if you conclude that Andersen acted corruptly and with the intent to make documents unavailable for an official proceeding.

Moreover, the Government is not required to prove that Andersen was successful or likely to succeed in subverting, undermining, or impeding the fact-finding ability of an official proceeding. Nor is the Government required to prove that Andersen was successful or likely to succeed in making documents unavailable for that proceeding. It is Andersen's purpose and intent, not the success of its effort that the Government must prove as elements of the charged offense.

* * *

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 1

United States District Court
Southern District of Texas

United States of America
v.
Arthur Andersen LLP.

Judgment in a Criminal Case
(For Organizational Defendants)

Case Number: 4:02CR00121-001

Rusty Hardin
Defendant Organization's Attorney

[CLERK, U.S. DISTRICT COURT]
[SOUTHERN DISTRICT OF TEXAS]
[ENTERED]
[10/21/02]
[MICHAEL N. MILBY, CLERK]

THE DEFENDANT ORGANIZATION:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1 on June 15, 2002 after a plea of not guilty.

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 U.S.C. § 1512(b)2) and § 3551 et. seq.	Obstruction of Justice	11/09/2001	1

The defendant organization is sentenced as provided in pages 2 through 5 of this judgment.

☐ The defendant organization has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant organization shall notify the United States Attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant Organization's Federal Employer I.D.
36-0732690

Defendant Organization's Principal Business Address:

33 West Monroe Street
18th Floor
Chicago, IL 60603-5385

October 16, 2002
Date of Imposition of Judgment

/s/ Melinda Harmon
Signature of Judicial Official

Melinda Harmon, U.S. District Judge
Name and Title of Judicial Officer

Defendant Organization's Mailing Address:

33 West Monroe Street
18th Floor
Chicago, IL 60603-5385

[October 21, 2002]
Date

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 2—Probation

DEFENDANT ORGANIZATION: ARTHUR ANDERSEN LLP.
CASE NUMBER: 4:02CR00121-001

PROBATION

The Defendant organization is hereby placed on probation for a term of 5 years

This term consists of FIVE (5) YEARS probation as to Count 1.

The defendant organization shall not commit another federal, state or local crime.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant organization pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant organization shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant organization shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) within thirty days from the date of this judgment, the defendant organization shall designate an official of the organization to act as the organization's representative and be the primary contact with the probation officer;

2) the defendant organization shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

3) the defendant organization shall notify the probation officer ten days prior to any change in principal business or mailing address;

4) the defendant organization shall permit a probation officer to visit the organization at any of its operating business sites;

5) the defendant organization shall notify the probation officer within seventy-two (72) hours of any criminal prosecution, and within thirty (30) days of the filing of any major civil litigation, or administrative proceeding against the organization;

6) the defendant organization shall not dissolve, change its name, or change the name under which it does business unless this judgment and all criminal monetary penalties imposed by this court are either fully satisfied or are equally enforceable against the defendant's successors or assignees;

7) the defendant organization shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets, unless the judgment and all criminal monetary penalties imposed by this court are fully satisfied.

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 2—Continued 1—Probation

Judgment—Page 3 of 5

DEFENDANT ORGANIZATION: ARTHUR ANDERSEN LLP.
CASE NUMBER: 4:02CR00121-001

SPECIAL CONDITIONS OF SUPERVISION

1) the defendant organization shall not associate with any persons or organizations engaged in criminal activity and shall not associate with any person or organization convicted of a felony unless granted permission to do so by the probation officer. This does not include associations with such persons or organizations as it pertains to the disposition of Andersen's legal matters.

2) the defendant organization must have a Court-approved compliance plan in effect at least ninety (90) days prior to re-entering the accounting/auditing business.

3) the defendant organization shall provide an annual report of its financial status including a copy of its U.S. income tax return to the probation officer.

4) as directed by the probation officer, the defendant organization shall notify third parties of risk that may be occasioned by the defendant organization's criminal record, and shall permit the probation officer to make such notification and to confirm the defendant organization's compliance with such notification requirement.

5) the defendant organization shall retain all documents and work papers as required by the Internal Revenue Service and professional auditing standards. Further, the defendant organization is to retain all documents and work papers related to any pending or threatened civil, criminal or regulatory litigation or investigation.

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 3, Part A—Criminal Monetary Penalties

DEFENDANT ORGANIZATION: ARTHUR ANDERSEN LLP.
CASE NUMBER: 4:02CR00121-001

CRIMINAL MONETARY PENALTIES

The defendant organization shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 3, Part B.

	Assessment	Fine	Restitution
Totals:	$400	$500,000	

☐ If applicable, restitution amount ordered pursuant to plea agreement .....$ _____

FINE

The defendant organization shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the options on Sheet 3, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

☐ The court has determined that the defendant organization does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An amended judgment in a Criminal Case for Organization Defendants will be entered after such a determination.

☐ The defendant organization shall make restitution to the following payees in the amounts listed below.

If the defendant organization makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 3, Part B—Schedule of Payments

DEFENDANT ORGANIZATION: ARTHUR ANDERSEN LLP.
CASE NUMBER: 4:02CR00121-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ In full immediately; or

B X $ 500,400 * immediately, balance due (in accordance with C, D, or E); or

C ☐ Not later than _____; or

D ☐ in installments to commence ____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection in the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (*e.g., equal, weekly, monthly, quarterly*) installments of $_____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant organization will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

* CRIMINAL MONETARY PENALTIES WERE PAID IN FULL ON OCTOBER 16, 2002.

☐ Joint and Several

☐ The defendant organization shall pay the cost of prosecution.

☐ The defendant organization shall forfeit the defendant organization's interest in the following property to the United States:

All criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[UNITED STATES COURTS]
[SOUTHERN DISTRICT OF TEXAS]
[FILED]
[JUN 15 2002]
[MICHAEL N. MILBY, CLERK OF COURT]

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. H-02-121
vs.	)	
ARTHUR ANDERSEN, LLP	)	

SPECIAL VERDICT FORM

With respect to your verdict, did all twelve of you unanimously agree that the same Andersen agent acted with the required knowledge and intent? (Please check one)

X (Yes) _____ (No)

[June 15, 2002] Date

/s/ Oscar Criner Foreman of the Jury

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[CLERK, U.S. DISTRICT COURT]
[SOUTHERN DISTRICT OF TEXAS]
[FILED]
[[06/15/02]]
[MICHAEL N. MILBY, CLERK]
[BY DEPUTY /s/ H. Tippen]

UNITED STATES OF AMERICA	}	
	}	CRIMINAL NO. H-02-121
vs.	}	
ARTHUR ANDERSEN, LLP	}	

VERDICT OF THE JURY

We, the Jury in the above entitled cause, find the Defendant, Arthur Andersen, LLP, [Guilty]
(Guilty) (Not Guilty)
of the offense charged in the indictment.

[June 15, 2002]
Date

/s/ Oscar Criner
Foreman of the Jury

18 U.S.C. § 1503

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1505

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with int nt to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1512
(2000 Version)

§ 1512. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112; and

(B) in the case of an attempt, imprisonment for not more than twenty years.

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction over an offense under this section.

(h) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(i) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

18 U.S.C. § 1512
(current version)

§ 1512. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to–

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release,, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release,, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1515

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.